Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

INDUSTRIAL CHEMICALS, INC.,

Petitioner,

v.

CITY OF TUSCALOOSA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can inference of a Sherman Act conspiracy in a circumstantial parallel pricing case be drawn without evidence tending to show that the defendant's conduct would be against its own economic self-interest and without evidence tending to show that the defendant had a reasonable motive to participate in the alleged conspiracy?

PARTIES TO THE PROCEEDINGS

The following persons or entities were parties to the proceedings in the court of appeals:

Auburn Water Works Board, Plaintiff

Baker Hill Water Authority, Plaintiff

The Board of Water and Sewer Commissioners of the City of Mobile, Plaintiff

The Board of Water & Sewer Commissioners of the City of Saraland, Plaintiff

Calhoun County Water and Fire Protection Authority, Plaintiff

Central Elmore Water Authority, Plaintiff

The City of Alexander City, Plaintiff

The City of Dothan, a municipal corporation, Plaintiff

City of Fairhope, Plaintiff

The City of Huntsville Water Works Utility Board, Plaintiff

City of Phenix City, Plaintiff

City of Sheffield, Plaintiff

City of Tuscaloosa, Plaintiff

City of Vernon Water and Sewer Board, Plaintiff

Dallas County Water and Sewer Authority, Plaintiff

Geneva Water Works and Sewer Board, Plaintiff

Harcros Chemicals, Inc., Defendant

Industrial Chemicals, Inc., Defendant

Jasper Water Works and Sewer Board, Inc., Plaintiff

Jefferson County, Alabama, Plaintiff

Jones Chemicals, Inc., Defendant

Municipal Utilities Board of Albertville, Plaintiff

North East Morgan County Water and Fire Protection Authority, Plaintiff

Opelika Water Works Board, Plaintiff

P.B. & S Chemical Co., Inc., Defendant

Perdido Bay Water, Sewer and Fire Protection District, Plaintiff

Town of Hayneville, Plaintiff

Tri-Community Water System, Plaintiff

Utilities Board of the Town of Citronelle d/b/a South Alabama Utilities, Plaintiff

The Utilities Board of the City of Gulf Shores, Plaintiff

The Utilities Board of the City of Muscle Shoals, Plaintiff

Van Waters & Rogers, Inc., Defendant

The Water Works Board of the City of Arab, Plaintiff

The Water Works and Sewer Board of the City of Birmingham, Plaintiff

Water Works & Sewer Board of the City of Centre, Plaintiff

The Water Works and Sewer Board of the City of Gadsden, Plaintiff

The Water Works and Sewer Board of the City of Greenville, Plaintiff

The Water Works Board of the City of Leeds, Plaintiff

The Water Works and Sanitary Sewer Board for the City of Montgomery, Plaintiff

The Water Works and Sewer Board of the City of Prichard, Plaintiff

The Water Works, Sewer and Gas Board of the City of Scottsboro, Plaintiff

The Water Works and Sewer Board of the City of Selma, Plaintiff

The Water and Sewer Board of the City of Talladega, Plaintiff

Westover Water and Fire Protection Authority, Plaintiff

STATEMENT PURSUANT TO RULE 29.6

Petitioner Industrial Chemicals, Inc. has no parent corporation nor any wholly-owned subsidiaries. No publicly owned company owns ten per cent (10%) or more of the stock in Industrial Chemicals, Inc.

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Petitioner Industrial Chemicals, Inc. ("Industrial") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *City of Tuscaloosa v. Harcros Chemicals, Inc.*, No. 95-6234 (11th Cir. Oct. 23, 1998).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. A) is reported at 158 F.3d 548. The opinion of the United States District Court for the Northern District of Alabama (App. B) is reported at 877 F. Supp. 1504. The district court's order (App. C) is not reported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on October 23, 1998. The Court of Appeals denied timely petitions for rehearing on February 9, 1999. (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

STATEMENT OF THE CASE

Plaintiffs allege that Industrial has violated § 1 of the Sherman Act by conspiring to fix prices in the Alabama repackaged chlorine market. Plaintiffs' evidence of Industrial's alleged agreement to conspire is circumstantial only, parallel pricing and resultant high incumbency rates (rates of bid awards by municipal entities to the incumbent chlorine sellers).

Manufacturers produce raw liquid chlorine in bulk. It is then repackaged into smaller quantities in pressurized containers for storage and delivery. Jones, Harcros, PB&S and Van Waters (the four defendants besides Industrial) perform this repackaging operation and then sell repackaged chlorine. Industrial does not repackage chlorine. Instead, Industrial distributes chlorine bought from repackager Jones in south Alabama and from repackager PB&S in north Alabama.

Plaintiffs are 39 Alabama municipal entities that purchased repackaged chlorine. During each year of the alleged collusion, 10 to 15 of the 39 plaintiffs bought chlorine through sealed bids that were publicly opened. The remaining plaintiffs bought chlorine by negotiating with one or more suppliers or by ordering from a supplier.

Plaintiffs allege that the defendants conspired to submit sealed bids based on "list prices," which defendants knew from the public bid openings. As to the majority of plaintiffs who did not solicit bids, plaintiffs contend that non-bid customers typically paid list price. Plaintiffs contend that, through list price parallelism, defendants allocated the entire repackaged chlorine market.

Much of plaintiffs' circumstantial evidence is based on defendants' submitting tie bids at times to some of the plaintiffs. Business conduct such as submitting tie bids is known as "conscious parallelism" when occurring noncollusively as the natural result of economics in oligopolistic markets. This Court defined conscious parallelism as a "process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit maximizing, supracompetitive level by recognizing their interdependence with respect to price and output decisions." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993); *see* VI P. Areeda, Antitrust Law, ¶ 1420a, at 119 (1986) ("[P]arallelism need not show anything more than a reluctance among the rivals to cut market prices that will be readily matched on the next transaction.").

Plaintiffs relied on expert witnesses to prepare statistics as circumstantial evidence of the existence of the alleged conspiracy and the identity of the alleged conspirators. Their statistics show the frequency of tie bids and of incumbent bidders retaining contracts, which the Eleventh Circuit referred to as incumbency rates.

In addition to these statistics, one of plaintiffs' experts looked at defendants' chlorine costs and gross profits. For the repackager defendants, the expert testified that the cost of raw chlorine was essentially stable from 1984 to 1989, while the packagers' gross profits were rising. In contrast, the expert's analysis showed that nonrepackager Industrial's costs were not stable but were rising, like the costs experienced by *plaintiffs*. According to plaintiffs' expert, Industrial's gross profits were stable during the alleged conspiracy and showed an increase only as the alleged

conspiracy ended, again the opposite of plaintiffs' evidence for the repackager defendants. App. B at 120a-121a.

Industrial's expert economist, Dr. Arthur Thompson, analyzed all of Industrial's repackaged chlorine sales (a much larger group than analyzed by plaintiffs' expert). He noted, as had plaintiffs' expert, that Industrial's gross profits went up as and after the alleged conspiracy supposedly ended — the opposite of the expectation for a conspirator. He also noted that Industrial's yearly total sales of repackaged chlorine to all customers was only "a tiny part" of Industrial's total chemical sales. Dr. Thompson testified that each of these undisputed facts make implausible Industrial's participation in plaintiffs' alleged conspiracy and each show that Industrial had no good business reason or motive to participate. Plaintiffs have never provided any alternative analysis of Industrial's chlorine sales or otherwise substantively disputed Dr. Thompson's economic analysis. *Id.* at 128a-135a.

The District Court granted all defendants' motions for summary judgment, following *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1583 (11th Cir. 1988). App. B at 101a-104a, 127a-128a.

The Eleventh Circuit reversed the summary judgment in Jones's, Harcros's and Industrial's favor, apparently overruling and certainly modifying *Dunnivant*. The Eleventh Circuit concluded as follows:

> [T]he evidence of very high incumbency rates in the market during the period of the alleged conspiracy, at a time of high and rising prices

> and profits but stable costs, establishes the necessary "plus factor" tending to exclude the possibility that the defendants were merely engaging in conscious parallelism.

App. A at 55a. In reversing the District Court, the Eleventh Circuit expressly held that plaintiffs were not required to have evidence tending to show that each defendant's conduct was contrary to its economic self-interest. *Id.* at 49a-50a n.35.[1]

In the Eleventh Circuit, Industrial repeatedly argued that it was entitled to summary judgment even if the other defendants were not, because the evidence does not show a motive for Industrial to participate in the alleged conspiracy. The Eleventh Circuit did not address Industrial's argument concerning motive.

REASONS FOR GRANTING THE WRIT

For Sherman Act claims based on parallel business conduct, the federal Circuits have split several ways over the proper basis for drawing an inference of conspiracy. Indeed, one Circuit has expressly recognized this split. *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.12 (D.C. Cir. 1984) (describing two approaches in the split).

---

1. The Eleventh Circuit affirmed the summary judgments in favor of PB&S and Van Waters on the antitrust claims. Based on these companies' having minimal market share during the alleged conspiracy, the Eleventh Circuit reasoned that it would be irrational for PB&S and Van Waters to participate in an alleged conspiracy that excluded them from the market. App. A at 43a-44a. Industrial, on the other hand, won the second or third most bids according to plaintiffs' statistics.

Without explanation, the Eleventh Circuit in the opinion below shifts its view amid this circuit split — a strong suggestion that a grant of certiorari is needed to resolve the confusion. *Cf.* App. A at 49a-50a (not following prior Eleventh Circuit precedent). Furthermore, the Eleventh Circuit's approach below conflicts with the holding in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986).

A. The Circuit Split

The federal circuits have three inconsistent approaches for what evidence in addition to conscious parallel business conduct is required to allow an inference of conspiracy. The Fifth, Eighth and Tenth Circuits require a plaintiff to show that a defendant's parallel conduct was contrary to its own economic self-interest. The Third, Ninth and District of Columbia Circuits apply the same test and also require a plaintiff to show that a defendant had a motive for participating in the conspiracy. The Second, Sixth and Eleventh Circuits follow an ad hoc approach only requiring the plaintiff to have evidence indicating that the defendants did not act independently.

1. *The Business Justification Test*

The Fifth, Eighth and Tenth Circuits apply a test asking whether the defendant's conduct was contrary to its own economic self-interest. *Cayman Exploration Corp. v. United Gas Pipeline Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989) (quoting *Pan Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981)); *Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160

(1985); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978). This test is at times called the business justification test.

The wording at times used for this test — whether the defendant's conduct was "contrary to its economic self-interest" — superficially is not clear; conspiring to set prices furthers the economic interests of most firms. *See City of Tuscaloosa*, 158 F.3d at 570 n.33 (discussing the lack of clarity from the test's wording). Yet, the test inquires whether, *assuming the defendant was acting independently*, the conduct was in its economic self-interest. *Admiral Theatre*, 585 F.2d at 884 (explaining that conduct is viewed as if defendants were acting alone). Accordingly, the test asks whether a defendant's conduct would be against the defendant's economic self-interest assuming the defendant was not part of an antitrust conspiracy.

This wording, however, still does not capture all of the test. The cases often state the test as requiring evidence showing that a defendants' "conduct was contrary to their economic self interest so as not to amount to good faith business judgment." *E.g.*, *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981). As explained by the Eighth Circuit, "[a]n inference of conspiracy is not warranted where the conduct is at least as consistent with legitimate business decisions . . . as with the [alleged conspiracy]." *Admiral Theatre Corp.*, 585 F.2d at 884 (citing *Theatre Enterprises, Inc. v. Paramount Film Distributors Corp.*, 346 U.S. 537 (1954)).

2. *The Venzie Test*

The Third Circuit developed a two-prong test in *Venzie Corp. v. United States Mineral Products Co., Inc.*, 521 F.2d 1309, 1314-15 (3rd Cir. 1975). The first prong of the *Venzie* test is the same as the business justification test. The second prong requires a plaintiff to show that the defendant had motive to participate in the conspiracy. *Id.*; *see also Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company, Inc.*, 998 F.2d 1224, 1242 (3d Cir.), *cert. denied sub nom., Moyer Packing Co. v. Petruzzi's IGA Supermarkets, Inc.*, 510 U.S. 994 (1993). The District of Columbia Circuit has expressly adopted the *Venzie* test and expressly rejected the tests of other circuits. *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.12 (D.C. Cir. 1984). The Ninth Circuit has also adopted the two-pronged *Venzie* test. *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 884-85 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983).

All three circuits applying the two-prong *Venzie* test base the second prong — motivation to participate in the conspiracy — on *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 287-88 (1968) (affirming summary judgment for defendant despite evidence of a consciously parallel refusal to deal where plaintiff was unable to show that defendant would benefit from conspiracy). *Zoslaw*, 693 F.2d at 885; *Kreuzer*, 735 F.2d at 1488 n.12; *Petruzzi's*, 521 F.2d at 1315. *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986) (requiring a plaintiff to show motive). The Third Circuit in *Venzie* also reasoned that, in the absence of motive, a defendant's parallel business conduct may as well be the result of coincidence as conspiracy, so no inference of conspiracy can be drawn. 998 F.2d at 1315.

3. *The Ad Hoc Approach*

The Second, Sixth and Eleventh Circuits apply an "ad hoc" approach. *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1168 (6th Cir. 1995), *cert. denied sub nom., Baker v. Bank of Bartlett*, 516 U.S. 1047 (1996); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir. 1987), *cert. denied sub nom., Coastal Corp. v. Apex Oil Co.*, 484 U.S. 977 (1987); *Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co.*, 513 F.2d 102, 111 (2d Cir. 1975).

Under the ad hoc approach, any evidence might be a plus factor, depending on the particular facts of the case. *Apex Oil Co.*, 822 F.2d at 254. Conduct contrary to economic self-interest (the business justification test) and a motive to conspire (the *Venzie* test's second prong) are just two examples of possible plus factors, *Wallace*, 55 F.3d at 1168; *Modern Home Institute*, 513 F.2d at 111. Other examples include "product uniformity, exchange of price information and opportunity to meet, . . . or a large number of communications," *Wallace*, 55 F.3d at 1168, or "a high level of interfirm communications." *Modern Home Institute*, 513 F.2d at 111.

Prior to the panel opinion in this case, the Eleventh Circuit had a fourth approach with two parts. It applied the business justification test used by the Fifth, Eighth and Tenth Circuits *and* required the showing of an additional ad hoc "plus factor" tending to indicate the absence of independent action. *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1583 (11th Cir. 1988).

Modifying *Dunnivant*, the panel below held that conduct contrary to the defendant's economic self-interest

is only an example of a possible "plus factor" that could support an inference of conspiracy. App. A at 49a-50a. The panel expressly rejected the proposition that conduct contrary to economic self-interest was required and did not analyze whether Industrial, or any other defendant, acted contrary to its economic self-interest. *Id.* at 49a-50a n.35 & 52a. Therefore, the Eleventh Circuit below has adopted the ad hoc approach of the Second and Sixth Circuits.

B. The Eleventh Circuit Has Erred

Without dispute, plaintiffs do not have: (1) evidence tending to show that Industrial's conduct would be against its own economic self-interest unless it was conspiring; nor (2) evidence tending to show a motive (business reason) for Industrial to participate in the alleged conspiracy.

The Eleventh Circuit erred, for two reasons, in reversing Industrial's summary judgment. First, Industrial's conduct was consistent with good business judgment and is what a non-conspiring defendant acting independently would have done. Second, Industrial had no motive to join in the alleged conspiracy, even if it did exist.

1. *The Business Justification Test*

An inference of conspiracy is not allowed under the Sherman Act when a defendant's conduct is as consistent with independent action as with agreement. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (a price-fixing case requires "evidence that tends to *exclude the possibility* of independent action") (emphasis added). The business justification test is the specific application of

this general rule to antitrust cases based on conscious parallelism. *Cf. Theatre Enterprises*, 346 U.S. at 541 (" 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely").

As to all defendants, plaintiffs' evidence tends to show tie bids (which led to *plaintiffs'* often choosing the incumbent) and stable costs and rising profits for the repackagers. In other words, plaintiffs' evidence tends to show defendants' parallel prices and the repackager defendants' increasing their profits. These facts would be the natural result from the exercise of legitimate business judgment that is nonactionable under antitrust law. *Cf. Brooke Group Ltd.*, 509 U.S. at 227 (explaining that sellers may, without violating antitrust law, share monopoly power and maximize profits at a supracompetitive level by recognizing their interdependence with respect to price). In other words, a non-conspiring defendant that bid in the Alabama repackaged chlorine market would have independently had legitimate business justification to bid as plaintiffs' evidence reflects. Thus, all defendants are entitled to summary judgment under the business justification test.

The Eleventh Circuit impliedly recognized that plaintiffs' evidence is insufficient under the business justification test. Yet, it modified *Dunnivant* to eliminate the test as a requirement and held against Industrial. Because the business justification test should be a requisite for inferring a conspiracy under antitrust law, Industrial should be entitled to summary judgment.

As to Industrial as a distributor, its place in the market is unique. It bought chlorine as a reseller from the

repackagers at prices similar to the prices paid by plaintiffs. Its situation has much in common with the very plaintiffs who have sued Industrial. The prices in Industrial's bid submissions only reflect Industrial's costs. Under no reasonable theory were Industrial's bids contrary to its economic self-interest. Therefore, under the business justification test, Industrial is entitled to summary judgment.

2. *The Second Prong of the Venzie Test*

In the 1986 *Matsushita* holding, this Court recognized that evidence showing motive is required before any inference of conspiracy is permitted:

> Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

475 U.S. at 596-97. *Accord First Nat'l Bank v. City Serv. Co.*, 391 U.S. 253, 287 (1968) (upholding summary judgment in conspiracy case based on lack of motive). Yet, neither the business justification test nor the ad hoc test require a plaintiff to adduce evidence of a defendant's motive as required under *Matsushita*. Only the two-prong *Venzie* test requires a showing of motive.

In *Matsushita*, the defendants not only had no motive to conspire, they "had every incentive *not* to engage in the conduct with which they [we]re charged. . . ." *Matsushita*, 475 U.S. at 595. Similarly, Industrial had no motive to

conspire; it had every incentive not to make the price it paid for repackaged chlorine go up and its gross profits go down.

For plaintiffs' Sherman Act claim, the proper test should lead to results consistent with *Matsushita*. But, the Eleventh Circuit's approach below leads to results inconsistent with *Matsushita* and inconsistent with the law in the Third, Ninth and District of Columbia Circuits. Therefore, the Eleventh Circuit's approach is in error and Industrial is entitled to summary judgment.

CONCLUSION

Based on the confusion among the circuits, Industrial petitions the Court to grant certiorari and provide direction as to what circumstantial evidence is required to support an inference of antitrust conspiracy in a case based on conscious parallelism.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED OCTOBER 23, 1998

CITY OF TUSCALOOSA; Municipal Utilities Board of Albertville, et al., Plaintiffs-Appellants, Auburn Water Works Board; Jasper Water Works and Sewer Board, Inc., et al., Plaintiffs-Intervenors-Appellants,

v.

HARCROS CHEMICALS, INC.; Jones Chemicals, Inc., et al., Defendants-Appellees.

No. 95-6234.

United States Court of Appeals,
Eleventh Circuit.

Oct. 23, 1998.

Rehearing Denied Feb. 9, 1999.

* * *

Before TJOFLAT and COX, Circuit Judges, and WELLFORD*, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

In the instant case, thirty-nine Alabama municipal entities brought suit in the United States District Court for

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* Honorable Harry W. Wellford, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

the Northern District of Alabama, alleging that five defendant chemical companies engaged in a conspiracy to fix prices for repackaged chlorine in Alabama in violation of both federal and state antitrust law. The plaintiffs also asserted claims for fraud under Alabama law. In a memorandum opinion, the district court ruled much of the plaintiffs' evidence inadmissible and granted summary judgment to all five defendants on the antitrust claims and the fraud claims. See City of Tuscaloosa v. Harcros Chems., Inc., 877 F.Supp. 1504 (N.D.Ala.1995). We review the district court's evidentiary rulings, reversing in part and affirming in part. We then review the district court's summary judgment rulings. We reverse the district court's entry of summary judgment with regard to three of the five defendants on the antitrust claims, and remand for further proceedings. We also vacate the district court's entry of summary judgment on most of the fraud claims, and remand for further proceedings.

I.

A.

The plaintiffs and plaintiffs-intervenors in this case are thirty-nine Alabama municipal entities that purchase repackaged chlorine for the treatment of drinking water, sewage, and swimming pools. Repackaged chlorine is liquid chlorine that has been pressurized and stored in containers for delivery to, and use by, chlorine consumers. The five defendant corporations are chemical companies that repackage or distribute chlorine in Alabama.[1]

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1. Defendant Harcros Chemicals, Inc., is a chlorine repackager organized under the laws of Delaware with its principal place of (Cont'd)

Appendix A

At the core of the plaintiffs' claims are their allegations that the defendants colluded with each other to set prices

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(Cont'd)
business in Kansas. Harcros was formerly known as Thompson-Hayward Chemical Co. For purposes of this opinion both Thompson-Hayward and Harcros will be referred to as "Harcros."

Defendant Van Waters & Rogers, Inc., is a chlorine repackager organized under the laws of the State of Washington with its principal place of business in Washington. In 1986, Van Waters & Rogers acquired the Moreland-McKesson Chemical Company. For purposes of this opinion, both companies are referred to as "Van Waters."

Defendant Jones Chemicals, Inc., is a chlorine repackager organized under the laws of the State of New York with its principal place of business in New York.

Defendant PB & S Chemical Company, Inc., is a chlorine repackager organized under the laws of the State of Kentucky with its principal place of business in Kentucky.

Defendant Industrial Chemicals, Inc., a chlorine distributor for defendants Jones Chemicals and PB & S Chemical Company, is organized under the laws of the State of Alabama with its principal place of business in Alabama.

The repackaging, distribution and sale of chlorine in Alabama takes place within the flow of interstate commerce, as is necessary for the plaintiffs to bring this action. See infra notes 5-7. Chlorine is imported into Alabama for repackaging and is then distributed and sold to Alabama municipal entities and to other customers in Alabama and elsewhere.

for repackaged chlorine distribution contracts. During the period of the alleged collusion, many Alabama municipal entities purchased chlorine by auction.[2] An entity seeking to purchase chlorine would solicit sealed bids from companies that had submitted bids in the past. Once the bids were received, the buyer would publicly open the bids and announce what each competitor had bid. The buyer would then award its contract to the lowest bidder. The plaintiffs allege that the defendants submitted sealed bids based on "list prices" previously determined amongst themselves, and in this way allocated the repackaged chlorine contracts as they wished.

Following investigations of the chlorine industry in the Southeast by the United States Department of Justice and the State of Florida,[3] Alabama's former Attorney General requested authority from a number of Alabama municipal entities to bring an antitrust action against chlorine companies on their behalf. His successor, however, changed course and declined, on behalf of the state, to participate in

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2. A minority of municipal entities negotiated chlorine prices with one or more suppliers.

3. The Justice Department convened a grand jury to investigate the chlorine industry, including the defendants and others, but eventually dropped its investigation. Florida's separate investigation yielded two federal antitrust suits: the "peninsula" case, filed in Jacksonville, and the "panhandle" case, filed in Pensacola. The district court assigned to the "panhandle" case announced that it would grant defendants' motion for summary judgment, at which point the State of Florida agreed to settle both cases. See Harcros, 877 F.Supp. at 1511.

the proposed litigation. See Harcros, 877 F.Supp. at 1511 n. 19.

Fifteen Alabama municipal entities then decided to proceed independently and brought this action in July 1992. Numerous other municipal entities intervened, and several original plaintiffs withdrew from the case. The complaints filed by the final thirty-nine plaintiffs,[4] as amended, presented four counts. The first count alleged that the defendants had engaged in a conspiracy to fix prices, allocate customers or markets, and rig bids in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1994).[5] The second count asserted that the defendants had engaged in a

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4. The plaintiffs and plaintiffs-intervenors did not consolidate their two complaints into one. The two complaints, however, are largely identical.

5. Section 1 provides:

> § 1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

conspiracy to monopolize the chlorine market in Alabama in violation of section 2 of the Sherman Act, 15 U.S.C. § 2 (1994).[6] The plaintiffs sought treble damages as relief on these federal antitrust claims pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15 (1994), and requested a permanent injunction preventing future collusion pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26 (1994).[7]

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6. Section 2 provides:

> § 2. Monopolizing trade a felony; penalty
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

7. Section 4 of the Clayton Act provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

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Appendix A

The third count of the complaints asserted that the defendants conspired to restrain trade in violation of Alabama Code § 8-10-1 et seq. (1993). The plaintiffs sought actual damages and $500 in statutory liquidated damages for each instance of injury or damage resulting from the alleged conspiracy pursuant to Alabama Code § 6-5-60 (1993).[8] The fourth count of the plaintiffs' complaints

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Section 16 of the Clayton Act provides in relevant part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity[.]

8. Price-fixing conspiracies are made unlawful by §8-10-3 of the Alabama Code, which provides:

> §8-10-3 Restraint of trade or production; misdemeanor.
>
> Any person or corporation, domestic or foreign, which shall restrain, or attempt to restrain, the freedom of trade or production, or which shall monopolize, or attempt to monopolize, the production, control, or sale of any commodity or the prosecution, management, or control of any kind, class, or description of business or which shall destroy, or attempt to destroy,

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Appendix A

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competition in the manufacture or sale of a commodity shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than $500 nor more than $2,000 for each offense.

Section 6-5-60(a) provides: §6-5-60 Generally.

(a)Any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500 and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly and may commence the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. All such actions may be prosecuted to final judgment against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, or judgment in favor of one or more of the defendants.

Under Alabama law, federal antitrust law "prescribe[s] the terms of unlawful monopolies and restraints of trade as they should . . . be administered in Alabama." Ex parte Rice, 67 So.2d 825, 829, 259 Ala. 570 (Ala. 1953); see also McCluney v. Zap Prof'l Photography, 663 So.2d 922, 926 (Ala.1995)(citing Rice for the proposition that federal law relating to monopolization governs actions brought under section 6-5-60). Our discussion of the relevant federal law, see infra part III, therefore applies to and controls our disposition of the plaintiffs' state- law antitrust claims as well as their federal antitrust claims.

asserted fraud claims under Alabama law. See Ala.Code § 6-5-100 et seq. (1993). The plaintiffs sought compensatory and punitive damages for these claims.

After discovery, the defendants moved to exclude the testimony of two of the plaintiffs' three expert witnesses, and to exclude several pieces of evidence that they asserted were inadmissible hearsay. The defendants also moved for summary judgment.

The district court, in a lengthy memorandum opinion, excluded the purported hearsay testimony, see Harcros, 877 F.Supp. at 1518-21, 1538, and much of the plaintiffs' expert testimony. See id. at 1524-30, 1532. The district court then granted summary judgment for the defendants on all claims. See id. at 1521-24, 1532-38. The plaintiffs now appeal, asserting that the district court improperly excluded their proffered evidence and that summary judgment was erroneously entered.

B.

We first review the district court's rulings on the admissibility of the purported hearsay evidence. Rulings on the admissibility of evidence are reviewed for abuse of discretion. See Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1554 (11th Cir.1995) ("The admissibility of evidence is committed to the broad discretion of the district court, and the decision to exclude certain evidence will be reversed only upon a clear showing of abuse of discretion."); see also Hines v. Brandon Steel Decks, Inc., 886 F.2d 299, 302 (11th Cir.1989) (applying abuse of discretion standard to

hearsay admissibility determination). "A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996). Thus, when the district court misinterprets the Federal Rules of Evidence or controlling case law, our review is plenary. Cf. Joiner v. General Elec. Co., 78 F.3d 524, 529 (11th Cir.1996), rev'd on other grounds, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

The factual findings of the district court that underlie its decisions regarding the admissibility of the purported hearsay evidence — such as its findings regarding whether a statement was made in furtherance of a conspiracy, or whether a particular document is a regular business record — are reviewed for clear error. See United States v. Bazemore, 41 F.3d 1431, 1434 (11th Cir.1994); United States v. Turner, 871 F.2d 1574, 1581 (11th Cir.1989). A finding of fact is clearly erroneous when, after reviewing the entirety of the evidence, the reviewing court "is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)).

After reviewing the district court's rulings on the admissibility of the purported hearsay evidence, we turn to that court's rulings on the admissibility of the plaintiffs' expert testimony. The Supreme Court recently has clarified the standard of review applicable to appellate consideration of determinations regarding the admissibility of expert

testimony. See General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), rev'g 78 F.3d 524, 529 (11th Cir.1996). In Joiner, the Court noted that a district court's evidentiary rulings are reviewed for abuse of discretion. See id. at __, 118 S.Ct. at 517. The Court then held that Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), did not alter this long-standing rule in the specific context of expert testimony, and in fact did not address the standard of appellate review of such rulings at all. See Joiner, 522 U.S. at __, 118 S.Ct. at 517. The Court went on to note that a court of appeals should apply this abuse of discretion standard of review uniformly, without regard to whether the district court ruling under review allowed or disallowed the expert testimony at issue. Id. We therefore review the district court's rulings excluding the plaintiffs' expert testimony for abuse of discretion. To the extent that a ruling of the district court turns on an interpretation of a Federal Rule of Evidence or on the court's decision to apply Daubert, however, our review is plenary. See Joiner v. General Elec. Co., 78 F.3d at 529, rev'd on other grounds, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); Carmichael v. Samyang Tire, Inc., 131 F.3d 1433, 1435 (11th Cir.1997), cert. granted sub nom. Kumho Tire Co. v. Carmichael, __ U.S. __, 118 S.Ct. 2339, 141 L.Ed.2d 711 (1998).

Having examined the district court's evidentiary rulings, we finally proceed to review the district court's entry of summary judgment on the basis of the admissible evidence. This review proceeds de novo. See Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc., 138 F.3d

869, 873 (11th Cir.1998); Uniforce Temp. Personnel, Inc. v. National Council on Compensation Ins., Inc., 87 F.3d 1296, 1299 (11th Cir.1996). "Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). "The party seeking summary judgment [must] identify[ ] for the district court those portions of the record 'which it believes demonstrate the absence of a genuine issue of material fact.' " Cohen v. United Am. Bank of Cent. Fla., 83 F.3d 1347, 1349 (11th Cir.1996) (quoting Cox v. Administrator United States Steel & Carnegie 17 F.3d 1386, 1396 (11th Cir.1994) (in turn quoting Celotex Corp., 477 U.S. at 323, 106 S.Ct. at 2552)). "There is no genuine issue for trial unless the non-moving party establishes, through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor." Cohen, 83 F.3d at 1349.

II.

A.

We consider first the district court's rulings regarding the admissibility of testimony that the defendants moved to exclude as inadmissible hearsay. We reverse in part and affirm in part.

1.

The plaintiffs proffered testimony regarding an alleged admission by the late Robert Jones ("Jones"), the former

chairman, chief executive officer, and president of defendant Jones Chemicals. Loraine and Peter Cassassa, friends of Jones during the period of the alleged conspiracy, testified in depositions that on several occasions in the mid-1980s, Jones admitted to them that he was at that time involved in fixing chlorine prices in the Southeast. Loraine Cassassa testified that Jones told her that he "got together with the people [who were] submitting the bids and they knew what each other were going to bid before that bid was ever submitted." She also testified that Jones told her that he knew such conduct was illegal, but that "[t]hat's how big business goes." Peter Cassassa gave substantially identical testimony.

The district court excluded the testimony of the Cassassas as "hearsay." See infra note 10; Harcros, 877 F.Supp. at 1518-19, 1538. We conclude that the court erred as a matter of law by making this determination and therefore abused its discretion. Accordingly, we reverse the ruling excluding that testimony.

Under the Federal Rules of Evidence, " '[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). In general, "[h]earsay is not admissible except as provided by [the federal] rules. . . ." Fed.R.Evid. 802. A "statement by [a] party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship," however, is deemed an admission by a party opponent and is excluded from the definition of hearsay. Fed.R.Evid. 801(d)(2)(D); see Zaben

v. Air Prods. & Chems., Inc., 129 F.3d 1453, 1456 (11th Cir.1997).

Robert Jones, as president of Jones Chemicals from 1986 to 1989, and as the chairman and CEO of the company from 1986 to 1993, clearly was an "agent or servant" of the company.[9] Moreover, the record on appeal establishes that Jones set chlorine prices for Jones Chemicals throughout the period of the alleged conspiracy. His purported statements regarding Jones Chemical's chlorine pricing practices thus "concern[ed] a matter within the scope of

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9. Because Fed.R.Evid. 801(d)(2)(D) does not define the term "agent," we must assume that Congress intended to refer to general common law principles of agency when it used the term. See United States v. Saks, 964 F.2d 1514, 1523-24 (5th Cir.1992) (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S.Ct. 2166, 2172-73, 104 L.Ed.2d 811 (1989)). At common law, senior officers of a corporation normally are agents and servants of the corporation. See 2A C.J.S. Agency § 4 (1972) ("An agent is . . . a person employed or authorized by another to act for him, or to transact business for him[, or] one entrusted with another's business . . . .") (citing cases); Restatement (Second) of Agency § 2 cmt. c (1958) ("[T]he officers of a corporation or a ship, . . . all of whom give their time to their employers, are servants equally with the janitor."); see also, e.g., Shelter Modular Corp. v. Cardinal Enters., Inc., 347 So.2d 1334, 1338 (Ala.1977) (vice-president of corporation is agent thereof); Ex parte Board of Sch. Comm'rs of Mobile County, 235 Ala. 82, 178 So. 63, 64 (Ala.1937) ("It is the general rule of the common law that the relationship of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.").

[his] agency or employment, made during the existence of the relationship." See, e.g., Guccione v. Hustler Magazine, Inc., 632 F.Supp. 313, 320 (S.D.N.Y.), rev'd on other grounds, 800 F.2d 298 (2d Cir.1986) (statements made by chief executive officer of defendant corporation, within scope of his authority, held admissible). Jones' purported statements to the Cassassas are therefore admissible as non-hearsay party admissions under Fed.R.Evid. 801(d)(2)(D).[10]

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10. The district court found the testimony inadmissible as to Jones on two grounds: (1) that "the president of a corporation is not the 'alter ego' of the corporation," and that Jones therefore did not "speak for" the corporation, as the court believed was required by controlling Alabama evidence law; and (2) that the purported statements did not fall under the co-conspirator hearsay exception found in Fed.R.Evid. 801(d)(2)(E). See Harcros, 877 F.Supp. at 1518-19. Both of these rulings are in error.

First, it is well settled that the Federal Rules of Evidence, not state evidence law, govern the admissibility of evidence in cases in federal court. See Fed.R.Evid. 1101; Johnson v. William C. Ellis & Sons Iron Works, Inc., 609 F.2d 820, 821 (5th Cir.1980). Under the Federal Rules, "it is [not] necessary to show that an employee or agent declarant possesses 'speaking authority,' tested by the usual standards of agency law, before a statement can be admitted against the principal." Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1565 (11th Cir.1991). Instead, it is necessary that the content of the declarant's statement concern a matter within the scope of his employment or agency. See Fed.R.Evid. 801(d)(2)(D); Wilkinson, 920 F.2d at 1565. The district court therefore erred as a matter of law in holding otherwise.

Second, Rule 801(d)(2)(E) establishes that "a statement by a coconspirator of a party during the course and in furtherance of

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The appellants argue that the Cassassas' testimony ought also to be admitted against the other defendants, on the ground that Jones' purported statements were made "during the course and in furtherance of the conspiracy" and therefore fall within the exemption contained in Rule 801(d)(2)(E). Declarations by one defendant in a conspiracy case may be admissible against other defendants as non-hearsay upon sufficient showing that the statement was made by a co-conspirator during the course and in furtherance of the conspiracy. See Fed.R.Evid. 801(d)(2)(E); Bourjaily v. United States, 483 U.S. 171, 175-76, 107 S.Ct. 2775, 2778-79, 97 L.Ed.2d 144 (1987); United States v. Young, 39 F.3d 1561, 1571 (11th Cir.1994). "For a declaration by one defendant to be admissible against other defendants . . ., the [plaintiffs] must establish by a preponderance of the evidence: (1) that a conspiracy existed, (2) that the defendant and the declarant were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy." United States v. Van Hemelryck, 945 F.2d 1493, 1497-98 (11th Cir.1991); see also, e.g., United States v. Byrom, 910 F.2d 725, 734 (11th Cir.1990); United States v. Allison, 908 F.2d 1531, 1533 (11th Cir.1990) (citing Bourjaily, 483 U.S. at 175, 107 S.Ct. at 2778- 79). In determining the admissibility

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the conspiracy" is non-hearsay evidence. Fed.R.Evid. 801(d)(2)(E). As discussed below, we agree with the district court's conclusion that Jones' purported statements were not made "during the course and in furtherance of the conspiracy." That the Cassassas' testimony is not made admissible by Rule 801(d)(2)(E), however, does not change the fact that the testimony is admissible as a party admission under Rule 801(d)(2)(D).

of co-conspirator statements, the court may consider both the co-conspirator's hearsay statement and independent external evidence. See Bourjaily, 483 U.S. at 181, 107 S.Ct. at 2781; United States v. Chestang, 849 F.2d 528, 531 (11th Cir.1988).

This circuit applies "a liberal standard in determining whether a statement is made in furtherance of a conspiracy." United States v. Santiago, 837 F.2d 1545, 1549 (11th Cir.1988). The statement need not be necessary to the conspiracy, but must only further the interests of the conspiracy in some way. See United States v. Caraza, 843 F.2d 432, 436 (11th Cir.1988) (per curiam). Statements made to solicit membership or participation in the conspiracy, for example, see United States v. Montes-Cardenas, 746 F.2d 771, 780 (11th Cir.1984), or statements explaining the conspiracy to a new member, see United States v. Reyes, 798 F.2d 380, 384 (10th Cir.1986), are made in furtherance of the conspiracy. The determination of whether a statement is made in furtherance of a conspiracy is a finding of fact subject to review for clear error. See United States v. Ayarza-Garcia, 819 F.2d 1043, 1050 (11th Cir.1987).

Jones' purported statements do not satisfy even this liberal standard. The purported statements were made to friends, who were neither involved in the alleged conspiracy nor invited to participate therein, over drinks or on the golf course. The statements could not have furthered the interests of the alleged conspiracy in any way. A statement that merely discloses the existence of a conspiracy to a non-conspirator, that merely "spills the beans," with no

intention of recruiting the auditor into the conspiracy does not further the conspiracy. See United States v. Posner, 764 F.2d 1535, 1538 (11th Cir.1985) (holding that a letter written by a co-conspirator, containing preliminary appraisals of real estate, was not made in furtherance of a conspiracy to overvalue the real estate and thus was not admissible as the statement of a co-conspirator because the letter was not written to conceal the conspiracy and served only to disclose the scheme); see also United States v. Moss, 138 F.3d 742, 744 (8th Cir.1998) (holding that "[a] statement made in furtherance of a conspiracy 'must somehow advance the objectives of the conspiracy, not merely inform the listener of the declarant's activities,' " in order to be admissible under Rule 801(d)(2)(E) (citation omitted)).

We conclude that the district court did not err in finding that Jones' purported statements were not made in furtherance of the alleged conspiracy, and that the Cassassas' testimony is therefore not admissible against the alleged co-conspirators. Because Jones' purported statements were non-hearsay party admissions, however, we conclude that the statements do fall within the exception contained in Rule 801(d)(2)(D), and that the Cassassas' testimony is therefore admissible against Jones Chemicals.

2.

The district court also excluded as inadmissible hearsay a typewritten notation on a bid tabulation compiled by one of the appellant municipal entities, the Board of the Mobile Water and Sewer Commission. The bid tabulation lists the

bids received by Mobile for a chlorine contract in April of 1987, and shows that Industrial Chemicals and Jones Chemicals submitted tie bids for the contract in question. The typewritten notation on the bid tabulation sheet, which appears next to the Industrial bid, reads: "This is a complimentary bid for Jones. As per O.W. Caine, Sales Manager, pass contract on to Jones Chem." Caine was a sales manager for Industrial. The appellants assert that this notation reflects Caine's, and hence Industrial's, intention to forgo the Mobile contract in order to maintain the distribution of contracts established by the alleged conspiracy.[11]

The district court excluded the notation as hearsay, apparently on the ground that it did not qualify as a party admission. See Harcros, 877 F.Supp. at 1520. We do not reach the question of whether the district court erred in excluding the notation, because the notation adds nothing to Caine's affidavit testimony, discussed infra, for purposes of summary judgment.[12]

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11. The plaintiffs assert that complimentary bids, i.e., bids submitted with no intention of winning the contract in question, were used by the defendants to create the illusion of competition in the Alabama chlorine market. The defendants reply that, because municipal entities often would solicit bids only from companies that had bid on previous contracts, complimentary bids were used merely to stay in the running for future contracts when, for whatever reason, a company did not wish, or was not able, to pursue a particular contract.

12. The district court apparently excluded the Caine notation on the ground that it did not qualify as a party admission under

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Rule 801(d)(2)(D); since Caine did not have final authority over chlorine bids, the court viewed any statement by him regarding the Mobile bid in question as "unauthorized." Harcros, 877 F.Supp. at 1520. As discussed in note 10, supra, the Federal Rules of Evidence do not require that Caine have had "speaking authority" in order for his statement to be admissible under the party admission exception; the district court's rationale was therefore legally erroneous. We could not determine whether the Caine notation is actually admissible as a party admission under Rule 801(d)(2)(D) even if it were necessary to do so, however, because the writer of the notation has not been identified and the record on appeal does not disclose whether the document was properly authenticated in the district court. The district court excluded the notation without a hearing, solely on the basis of the parties' briefs.

The plaintiffs also argued that the notation was admissible as a regular business record under Rule 803(6). Rule 803(6) provides an exception from the general prohibition on hearsay when the proffered statement is

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Fed.R.Evid. 803(6). The district court apparently rejected this argument without comment, and the plaintiffs complain of this

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holding on appeal. On the basis of the inadequate record on appeal, the notation appears not to have been a properly authenticated regular business record. The notation is admissible under Rule 803(6) if it is "[a] memorandum [or] record . . . of acts [or] events . . . made at or near the time by, or from information transmitted by, a person with knowledge" of the acts in question, and "if it was the regular practice of the business activity to make the memorandum [or] record . . . all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness." Fed.R.Evid. 803(6) (emphasis added). From the record on appeal, the Caine notation appears not to satisfy the requirements of the business records exception because the record reveals no attempt whatsoever to authenticate the notation, as is explicitly required by Rule 803(6). See Fed.R.Evid. 803(6); United States v. Williams, 837 F.2d 1009, 1013 n. 6 (11th Cir.1988) (proper foundation for admission of 803(6) testimony should include testimony of witness with personal knowledge of how document was compiled); Itel Capital Corp. v. Cups Coal Co., 707 F.2d 1253, 1259-60 (11th Cir.1983) (person who actually prepared business record need not testify but other circumstantial evidence and testimony must suggest trustworthiness of documents); United States v. Dreer, 740 F.2d 18, 20 (11th Cir.1984) (proper foundation for admission of business record must sufficiently indicate reliability, including "circumstances surrounding the origin and the nature of the compilation"). The district court rejected the plaintiffs' invocation of the business records exception, however, in the same fashion that it rejected their reliance upon the party admission exception — on the basis of the parties' briefs alone. We therefore could not determine whether the district court erred in concluding that the Caine notation is not admissible under Rule 803(6), even if it were necessary to do so.

We also note that, even if the notation is determined not to be admissible as hearsay, the notation might be admissible as

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The district court also excluded an affidavit offered by Caine, and provided numerous reasons for doing so. See Harcros, 877 F.Supp. at 1520. Portions of the affidavit, the court stated, were "ambiguous" because "none of [the affidavit] testimony establish[ed] conspiracy." The court also concluded that "[t]he other portions of Mr. Caine's affidavit add[ed] nothing" because they were "inadmissible hearsay" and because the affidavit could not "stand alone."

All of these grounds for excluding Caine's affidavit testimony are erroneous. Questions regarding the weight of the affidavit testimony, such as whether the affidavit is "ambiguous," are not matters for consideration by the court on summary judgment. The factfinder at trial will decide whether to lend credence to the affidavit information. With regard to the portions of the affidavit that the court ruled were "inadmissible hearsay," we believe the court erred in its determination. As noted in part II.A.1, supra, " '[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). No part of Caine's affidavit fits this definition. Caine testifies in his affidavit regarding the withdrawn Mobile bid, bidding practices at Industrial, and

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non-hearsay insofar as it is not offered to prove the truth of the matter asserted. See Fed.R.Evid. 801. The Caine notation might be offered for several purposes other than to prove the truth of the matter asserted. The notation merely could not be offered to prove that Caine instructed the Mobile board to withdraw Industrial's bid; the appellants would have to rely on Caine's affidavit testimony and other evidence to support that proposition.

bidding practices at Harcros — all matters in which he personally participated or which he personally observed. At no point in the affidavit does Caine relate any statement made by anyone that constitutes inadmissible hearsay.[13] The

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13. Two statements in the Caine affidavit may have been the cause of the district court's hearsay concerns. In discussing a bid that he participated in submitting to the Mobile Water and Sewer Board in 1987, while employed as a sales representative for Industrial in the Mobile/Dothan area, Caine stated: "Mr. William Welch of Industrial Chemicals told me that, because there was a tie bid and Jones was the incumbent, Industrial needed to bow out gracefully." The following sentence of Caine's affidavit read: "I then communicated that information to Mrs. Whitworth [of the Mobile Board]. . . ."

The alleged statement of Welch to Caine, however, constitutes a non-hearsay admission by a party opponent. See Fed.R.Evid. 801(d)(2)(D). Welch, as president of Industrial, was an agent of the company. In addition, since Welch stated in his deposition that he had sole responsibility for determining chlorine bid prices during a period that included 1987, his statement that Industrial should "bow out" of this particular chlorine bid concerned a matter within the scope of his agency and was made during the existence of that agency relationship. Cf. supra note 9 and accompanying text.

Caine's report of his past statement to Mrs. Whitworth also qualifies as a non-hearsay admission under Rule 801(d)(2)(D). Welch stated in his deposition that Caine was an Industrial sales representative who served the Mobile area during 1987. As such, Caine was an agent of Industrial when he communicated Welch's "bow out" directive to Mrs. Whitworth of the Mobile Board. Communicating a bid (or the withdrawal thereof) authorized by his supervisor to a prospective customer in the Mobile area surely was within the scope of Caine's agency as a sales representative for that area. We express no opinion on whether this statement would constitute inadmissible hearsay if it did not qualify as an admission.

district court therefore abused its discretion in excluding Caine's affidavit testimony. Consequently, we conclude that this testimony is admissible in its entirety.

3.

The district court also excluded the testimony of Barbara Krysti, who offered testimony against Harcros. See Harcros, 877 F.Supp. at 1520-21. Barbara Krysti is the widow of Lloyd Krysti, who was a sales manager at Harcros. Barbara Krysti stated in an affidavit that

> [i]n 1987 or 1988, Lloyd found out that Joe Ragusa [(Harcros' vice-president for the Southeast)] was getting together with his competitors and fixing the price of chlorine before bids were submitted. Lloyd's reaction to me was that Joe was crazy for doing this and that it was illegal and that he could go to jail. . . . Lloyd first told me about the price fixing in 1988. We talked about it several times after that.

The proffered testimony is double hearsay; Barbara Krysti relates Lloyd Krysti's account of what Joe Ragusa said.[14] Such "hearsay included within hearsay is not

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14. We assume arguendo that Lloyd Krysti "found out" about the alleged conspiracy through conversations with Ragusa or by overhearing Ragusa speak about the conspiracy. Even if Lloyd "found out" about the alleged conspiracy in some other fashion, however, our conclusion — that Barbara Krysti's testimony is inadmissible — remains the same. No matter how Lloyd Krysti "found out" about the conspiracy, Barbara Krysti's recitation of his statements to her is inadmissible hearsay for the reasons stated in the text.

excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Fed.R.Evid. 805; see, e.g., Mahlandt v. Wild Canid Survival and Research Ctr., Inc., 588 F.2d 626, 630 (8th Cir.1978). Because chlorine pricing and sales were within the scope of Joe Ragusa's employment with Harcros, Ragusa's statements to Lloyd Krysti clearly fall within the party admission exception to the hearsay rule.

Lloyd Krysti's statements to Barbara Krysti, however, do not fall within any exception to the hearsay rule. The record establishes that chlorine pricing was not substantially within the scope of Lloyd Krysti's employment. Lloyd Krysti was involved in the pricing and sales of other chemicals and was rarely and only ministerially involved in chlorine sales. Lloyd Krysti did not set prices for chlorine. Indeed, the plaintiffs themselves assert that Joe Ragusa was solely responsible for setting chlorine prices in Alabama, and none of the many Harcros documents in the record indicate otherwise. On the contrary, in a 1984 memorandum, Ragusa severely upbraided several Harcros sales managers who set chlorine prices without his approval.

Because the content of Lloyd Krysti's statements did not concern a matter within the scope of his employment or agency, they do not fall within the party admission exception in Rule 801(d)(2)(D). See Wilkinson, 920 F.2d at 1565-66. In addition, Lloyd Krysti's statements were not made in furtherance of the alleged conspiracy, but "merely informed" Barbara Krysti — a non-conspirator — of the existence of the alleged conspiracy. See Moss, 138 F.3d at 744; cf. Fed.R.Evid. 801(d)(2)(E). Because Lloyd Krysti's

statements to Barbara Krysti do not fall within any exception to the hearsay rule, we affirm the district court's ruling excluding the testimony of Barbara Krysti.

B.

We next turn to the district court's rulings on the admissibility of the plaintiffs' proffered expert testimony. The district court excluded the testimony of Perry Garner, a certified public accountant. Garner offered data and testimony regarding costs borne and profits garnered by the defendants in the Alabama chlorine market, and also verified the data included in a database prepared by another of the plaintiffs' experts, statistician James McClave. McClave offered data showing, and testimony regarding the statistical significance of, market shares in the Alabama chlorine market, incumbency rates (i.e., the frequency with which companies retained chlorine contracts with particular municipalities from year to year), the frequency of tie bids in the market, prices bid by the defendants, winning bid prices, and costs borne by the defendants. The district court excluded McClave's testimony, in its entirety, as well. The data compiled by McClave were also used by Dr. Robert Lanzillotti, an economist who offered deposition testimony as well as a report regarding the economic structure of the Alabama chlorine market and the likelihood, from an economic standpoint, that a price-fixing conspiracy existed in that market. The district court criticized Lanzillotti's testimony at length, see Harcros, 877 F.Supp. at 1524-28, 1530-32, but did not exclude the evidence. See id. at 1538. The defendants do not challenge the district court's denial of their motion to exclude Lanzillotti's testimony.

Appendix A

Federal Rule of Evidence 702,[15] as explained by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589, 113 S.Ct. 2786, 2794-95, 125 L.Ed.2d 469 (1993), and its progeny, controls determinations regarding the admissibility of expert testimony. Expert testimony may be admitted into evidence if: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert;[16] and (3) the testimony assists the trier of fact,

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15. Rule 702 reads:

> Rule 702. Testimony by Experts
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> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

16. The Daubert Court noted that "[t]he inquiry envisioned by Rule 702 is, we emphasize, a flexible one." Daubert, 509 U.S. at 594, 113 S.Ct. at 2797. "Many factors will bear on the inquiry [into whether an expert's reasoning or methodology is reliable], and we do not presume to set out a definitive checklist or test." Id. at 593, 113 S.Ct. at 2796. Nevertheless, the Court did identify certain factors that may be pertinent to such an inquiry. These factors include: "whether [the theory or technique at issue] can be (and has been) tested"; whether it "has been subjected to peer review and publication"; the "known or potential rate of error" of

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through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. See Fed.R.Evid. 702; Daubert, 509 U.S. at 589, 113 S.Ct. at 2794 (holding that "under the [Federal] Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."); Joiner v. General Elec. Co., 78 F.3d at 529-30, rev'd on other grounds, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (stating that Rule 702 requires that the expert be qualified and that his testimony assist the trier of fact); see also Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1238 (3d Cir.), cert. denied sub nom. Moyer Packing Co. v. Petruzzi's IGA Supermarkets, Inc., 510 U.S. 994, 114 S.Ct. 554, 126 L.Ed.2d 455 (1993) (combining Rule 702's requirements with the reliability requirement in a three-part test for admissibility).

We conclude that the district court abused its discretion in excluding Garner's testimony and therefore reverse that ruling. We further conclude that the district court's interpretations of Daubert and of Rules 104 and 702, which formed the basis for the court's exclusion of the testimony of McClave, were erroneous as a matter of law. We also believe, however, that portions of McClave's testimony lie outside of his competence as a statistician and that the

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the technique, as well as the "existence and maintenance of standards controlling [its] operation"; and the degree to which the relevant scientific community accepts the theory or technique as reliable. Id. at 593-94, 113 S.Ct. at 2796-97. We discuss these factors in greater detail in note 25, infra.

methodology underlying a small portion of McClave's data and testimony is fundamentally flawed, thus requiring the exclusion of those portions of McClave's data and testimony. Accordingly, we affirm the district court's ruling with regard to these portions, but reverse its ruling excluding the remainder of McClave's testimony.

1.

Garner analyzed the costs, revenues, and profits of the defendants and verified the data compiled by McClave and used by McClave and Lanzillotti. Although the defendants did not move to exclude Garner's testimony, the court excluded it sua sponte without benefit of a Daubert hearing and with little discussion:

> The "expert" testimony of Mr. Perry Garner, C.P.A., is also inadmissible. He is no more qualified than Dr. McClave to testify on opinions based on economic theory. His deposition testimony regarding Van Waters' actual profit margins shows only that he did not consider a number of important cost factors. Significantly, exhibits produced by Mr. Garner have all been produced since his deposition at which time he expressed no opinions concerning the possibility of the existence of or the members of any antitrust conspiracy.

Harcros, 877 F.Supp. at 1532.

In evaluating the district court's reasoning under our three-part test for admitting expert testimony, we begin by

concurring with the district court's assertion that Garner was not qualified to render opinions based on economic theory. Nowhere in his extensive testimony, however, did Garner offer any such opinion. As to the testimony that Garner did offer, it seems apparent that he was qualified to provide it.[17] With respect to the reliability element, the district court did not identify the "important cost factors" that Garner ostensibly overlooked and that could have affected the reliability of his methodology. Upon review of Garner's testimony, we find that he considered material costs, labor costs, overhead costs, transportation costs, depreciation costs, insurance costs, and a host of other costs. We are at a loss to identify any "important cost factors" that Garner overlooked. Finally, Garner need not have expressed any opinion regarding the existence of any conspiracy in order for his testimony to be admissible under Rule 702; his testimony need only have "assist[ed] the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. Garner's testimony does so by calculating, compiling, and explaining the costs borne and

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17. Garner holds a C.P.A. license and has experience analyzing the books of companies that participate in allegedly collusive markets. The defendants, who did not move for the exclusion of his testimony, do not attack his methodology on appeal. We do not doubt that accounting expertise is among the sorts of technical and specialized expertise the use of which is governed by Rule 702 and Daubert. See Morse/Diesel, Inc. v. Trinity Indus., Inc., 67 F.3d 435, 444 (2d Cir.1995) (stating in dicta that expert testimony of certified public accountants is likely to be admissible); Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183, 186 (7th Cir.1993) (requiring application of Daubert standard to accountant's expert testimony).

profits enjoyed by the defendants during the period of the alleged conspiracy; this information would assist the trier of fact in determining whether, for purposes of the antitrust claims, the defendants acted in a consciously parallel fashion[18] and whether, for purposes of the fraud claims, defendants' costs impelled price increases. We therefore conclude that the district court abused its discretion in excluding Garner's testimony.

2.

The district court criticized at length the testimony of the plaintiffs' statistician, Dr. James McClave, and ultimately excluded McClave's testimony in its entirety. We hold that the district court excluded McClave's data and testimony on the basis of a legally erroneous interpretation of Rule 702, and that the court abused its discretion in excluding McClave's testimony in its entirety. We conclude, however, that parts of McClave's testimony must be excluded because those parts concern issues that are outside McClave's area of competence as a statistician. We also hold that a small portion of McClave's data and testimony must be excluded because of a flaw in the statistician's definition of the relevant market.

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18. As is discussed in part III.A.3, infra, in order to prevail on their claim of the existence of a price-fixing conspiracy without direct evidence, the plaintiffs must show (1) that the defendants acted in a consciously parallel fashion, and (2) "plus factors" that tend to exclude the possibility of non-collusive action. See Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1583 (11th Cir.1988); Gainesville Utils. Dep't v. Fla. Power & Light Co., 573 F.2d 292, 300-02 (5th Cir. 1978).

Appendix A

The district court's memorandum opinion offered several grounds for excluding McClave's testimony.[19] See Harcros, 877 F.Supp. at 1528-30. Some of these grounds are sufficient to warrant the exclusion of parts of McClave's testimony. As the following discussion demonstrates, however, none of these grounds is sufficient to warrant the exclusion of McClave's testimony in its entirety (as would, for instance, a finding that McClave was not qualified to testify as an expert in antitrust statistics).[20] We therefore conclude that the district court abused its discretion in excluding admissible portions of McClave's testimony by ruling that McClave's testimony in its entirety was inadmissible.

The district court first attacked McClave's methodology:

> McClave's methodology to determine the existence of a conspiracy is his subjective judgment. His subjective judgments, however, cannot be tested. His opinions about whether

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19. The district court's opinion is far from clear. The grounds for the exclusion of McClave's testimony that we identify are those that we are able to reconstruct from the conclusory and disjointed miscellany that constitutes the district court's discussion of McClave's testimony.

20. The defendants do not assert, and could not reasonably assert, that McClave is not qualified to testify as to statistical evidence in antitrust cases. McClave holds a Ph.D. in statistics and has considerable experience in the analysis of markets alleged to be collusive.

> high losing bids are signals is based on looking at the data using his "experience" and "judgment." He admits there is no statistical test to determine that a high losing bid is a signal. His statistical analysis is not impressive. Having testified, McClave has not made a case under Fed.R.Evid. 104. His statistics show anything but a successful conspiracy.

Harcros, 877 F.Supp. at 1529. Review of this passage reveals two fundamental legal errors. We first consider an error that pervades the court's opinion: the confusion and conflation of admissibility issues with issues regarding the sufficiency of the plaintiffs' evidence to survive summary judgment.[21] To put it succinctly, McClave's data and testimony need not "show a successful conspiracy" to be admitted under Rule 702 as circumstantial evidence of a conspiracy. As expert evidence, the testimony need only assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. As circumstantial evidence, McClave's data and testimony need not prove the plaintiffs' case by themselves; they must merely constitute one piece of the puzzle that the plaintiffs endeavor

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21. It is apparent that this problem, along with many others that we identify in this part of the opinion, might have been avoided had the district court simply held a Daubert hearing to allow the parties to clarify their positions, as well as the law, regarding the admissibility of these experts' testimony. While Daubert hearings are not required by law or by rules of procedure, they are almost always fruitful uses of the court's time and resources in complicated cases involving multiple expert witnesses, such as the instant case.

to assemble before the jury. See Burrell v. Board of Trustees of Ga. Military College, 970 F.2d 785, 793 (11th Cir.1992); 1 John W. Strong et al., McCormick on Evidence § 185, at 777 (4th ed. 1992) ("Direct evidence is evidence which, if believed, resolves a matter in issue. Circumstantial evidence may also be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the proposition to which it is directed." (internal citation omitted)). In requiring that McClave's data and testimony "show a successful conspiracy" in order to be admitted into evidence, therefore, the district court misinterpreted Rule 702 and thus abused its discretion. See Koon, 518 U.S. at 100, 116 S.Ct. at 2047 ("A district court by definition abuses its discretion when it makes an error of law.").[22]

The district court also erred in relying upon Rule 104 of the Federal Rules of Evidence as support for its exclusion of McClave's data and testimony. Rule 104(b) allows a district court to determine preliminary questions of fact necessary to apply the Federal Rules of Evidence. The rule itself, however, does not provide a ground for the exclusion

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22. This error is repeated in the district court's discussion of McClave's analysis of tie bids, see Harcros at 1529, and of Industrial's profits, see id. at 1529-30. Whether or not McClave's testimony, standing alone, supports an inference that Industrial or any other defendant actually conspired to fix prices is not relevant to the question of the admissibility of the testimony; it is instead a matter for consideration at summary judgment, when the court must determine whether a trier of fact could find for the plaintiffs on the evidence adduced. See Cohen v. United Am. Bank of Cent. Fla., 83 F.3d 1347, 1349 (11th Cir.1996).

of any evidence as inadmissible under the Rules. The district court's incorrect use of Rule 104 was apparently rooted in its concern about the reliability of McClave's testimony.[23] This concern, however, is properly addressed under Rule 702 and Daubert. See Daubert, 509 U.S. at 589, 113 S.Ct. at 2795. The district court's erroneous reliance upon Rule 104 is thus a second ground for concluding that the court abused its discretion in excluding McClave's testimony in its entirety.

The district court's fundamental criticism of McClave's testimony — that McClave's assertions regarding the existence of a conspiracy in general, and his characterization of certain bids as "signals" to co-conspirators in particular, were outside of his competence as a statistician — is, however, essentially correct. McClave's testimony is admissible only insofar as it assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. His characterizations of documentary evidence as reflective of collusion, and his characterizations of particular bids as "signals," do not do so, because the trier of fact is entirely capable of determining whether or not to draw such conclusions without any technical assistance from McClave or other experts. In addition, McClave's opinions regarding

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23. We draw this conclusion on the basis of the district court's conclusory statement that McClave's "statistical analysis is not impressive." As we explain below, we conclude that a small portion of McClave's testimony is in fact unreliable and inadmissible. At this point, however, we endeavor to clarify the legal errors that permeate the district court's discussion of McClave's (and Lanzillotti's) testimony.

the legal standards applicable to this case are outside of his competence and must be excluded.

On the other hand, most of McClave's testimony is entirely within his competence as a statistician and would be helpful to a trier of fact. Moreover, McClave utilized well-established and reliable methodologies in the preparation of most of his statistics and his testimony. He generated the statistics underlying his testimony through simple compilation of data from the plaintiff municipalities' records, from documents and books obtained from the defendants through discovery, and from public sources.[24] McClave's compilations of that data into utile measurements of bid prices, costs, tie bid frequencies, incumbency rates, and so on, and his testimony regarding estimated damages, are the products of simple arithmetic and algebra and of multiple regression analysis, a methodology that is well-established as reliable. See, e.g., Askew v. City of Rome, 127 F.3d 1355, 1365 n. 2 (11th Cir.1997) (in voting rights case, district court admitted expert statistical testimony based in part on multiple regression analysis); Petruzzi's, 998 F.2d at 1238.[25]

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24. The defendants do not attack the provenance or authenticity of McClave's raw data.

25. Twenty-nine states, along with the territories of Guam and Puerto Rico, have briefed this appeal as amici curiae in support of the appellant municipalities. The amici helpfully point out that, although "an important aspect of assessing scientific validity (and therefore evidentiary reliability) is the ability of other scientists to test or retest a proponent's theory," not every scientific or technical

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methodology applied by expert witnesses is susceptible to such an analysis. In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 758 (3d Cir.1994), cert. denied sub nom. General Elec. Co. v. Ingram, 513 U.S. 1190, 115 S.Ct. 1253, 131 L.Ed.2d 134 (1995). Economic or statistical analysis of markets alleged to be collusive, for instance, cannot readily be repeatedly tested, because each such case is widely different from other such cases and because such cases cannot be made the subject of repeated experiments. The proper inquiry regarding the reliability of the methodologies implemented by economic and statistical experts in this context is not whether other experts, faced with substantially similar facts, have repeatedly reached the same conclusions (because there will be few or no cases that have presented substantially similar facts). Instead, the proper inquiry is whether the techniques utilized by the experts are reliable in light of the factors (other than testability) identified in Daubert and in light of other factors bearing on the reliability of the methodologies. See supra note 16; see also, e.g., Ohio ex rel. Montgomery v. Louis Trauth Dairy, Inc., 925 F.Supp. 1247, 1252-53 (S.D.Ohio 1996) (noting that Daubert factors should be applied flexibly in determining admissibility of economic and statistical expert testimony); In re Aluminum Phosphide Antitrust Litig., 893 F.Supp. 1497, 1506 (D.Kan.1995) ("To the extent that Daubert factors are relevant to its determination [whether an economist's methodologies are reliable], the Court considers them along with any other relevant factors. . . . The inquiry is a flexible one, with the overarching subject being the evidentiary relevance and reliability of the principles that underlie a proposed submission."). One factor left unenumerated by the Daubert Court is whether "the methods used by the expert to derive his opinion satisfy the standards for scientific methodology that his profession would require of his out-of-court research." People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 111 F.3d 528, 537 (7th Cir.1997). Taking this factor into account along with the factors identified in Daubert, we readily conclude that McClave's methodologies are quite reliable, with the small exception explained infra.

We therefore conclude that most of McClave's testimony (all that is within his competence as a statistician) satisfies the three interrelated requirements for admission under Rule 702: McClave is qualified to testify regarding statistical measurements of events in the Alabama chlorine market during the period of the alleged conspiracy, such testimony will assist the trier of fact, and the methodologies that McClave used in measuring these events are generally reliable. Upon closer review, however, we find that the methodology underlying a small portion of McClave's data and testimony is fundamentally flawed, and that the evidence based thereon is consequently unreliable and must be excluded.

The district court correctly pointed out that McClave's database included data regarding chlorine sales in the Florida panhandle as well as in Alabama.[26] See Harcros, 877 F.Supp. at 1528 & n. 57. The inclusion of Florida sales data is problematic because, as the district court pointed out, "[t]he suit alleges a conspiracy in the state of Alabama — not Alabama, the Florida panhandle, and the

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26. The district court also attacked McClave's market definition on the ground that "Dr. McClave calls his statistics 'market' shares, but admits that his numbers only include that portion of the market in which the plaintiffs buy chlorine by sealed bids." Harcros, 877 F.Supp. at 1529 n. 58. Our review of the record reveals that the court's assertion is false; McClave's database did indeed include data from the Alabama municipalities that purchased chlorine through negotiations with the defendants and other chemical companies rather than through sealed-bid auctions, and McClave so stated in both his prepared report and his deposition testimony.

Southeastern states." Id. Data relevant to allegations of collusive activity in Florida may be used for corroborative purposes, but should not be commingled with data regarding Alabama transactions for purposes of making calculations intended to be used as circumstantial evidence of collusive behavior in Alabama. Including data regarding transactions that were not part of the alleged conspiracy in the database skews any cumulative measurements, such as percentages or frequencies, that depend upon the size and characteristics of the database as a whole and that are intended to describe the alleged conspiracy.

On the other hand, most of McClave's data, as well as the testimony regarding that data, do not suffer from this problem; these data either do not include any information regarding transactions in Florida, include only Florida data that can readily be separated from Alabama data, or are not expressed in percentages or frequencies and thus are not skewed by the inclusion of Florida data. McClave's data regarding the frequency of tie bids and of incumbent bidders retaining contracts, for instance, are for the Alabama market alone, and do not include Florida data; these data, and the testimony based thereon, are thus reliable and admissible. McClave's data on bid prices and on the costs borne by the defendants are not expressed in percentages or frequencies but in mere compilations of prices and costs. Since the Florida data on prices and costs can readily be separated from the Alabama data, the Florida data may be used by the trier of fact for corroborative purposes if they indicate collusive behavior in the Florida panhandle or ignored if they do not. McClave's market share measurements regarding the northern half of Alabama do not include

Florida data and are therefore admissible; McClave's measurements of the defendants' respective market shares for the southern half of Alabama and for the Florida panhandle, on the other hand, are skewed by the inclusion of the Florida data and must be excluded.

In sum, we affirm the district court's exclusion of McClave's data and testimony in part and reverse it in part. We affirm the district court's exclusion of McClave's measurements and testimony regarding market shares in the southern Alabama submarket. We also affirm the district court's exclusion of McClave's opinions regarding the law controlling the case and of his characterizations of documentary evidence as tending to show collusive behavior. We reverse the district court's exclusion of the remainder of McClave's data and testimony.[27]

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27. As noted in the introduction to part II.B, supra, the district court lengthily criticized the testimony of Dr. Robert Lanzillotti, an economist whose testimony as an expert was proffered by the plaintiffs; the court did not, however, exclude Lanzillotti's testimony. The defendants have not questioned the district court's denial of their motion to exclude Lanzillotti's testimony. We note in passing that much of Lanzillotti's testimony does indeed appear to warrant exclusion: specifically, Lanzillotti's opinions regarding the legal standards applicable to the case are outside of his competence as an economist (and are erroneous) and should be excluded. The same is true of Lanzillotti's characterizations of pieces of documentary evidence as tending to show collusion; such judgments are for the court to make at summary judgment and for the trier of fact to make at trial. Furthermore, we point out that Lanzillotti's professed market definition is clearly wrong. Lanzillotti stated in his report that "[t]he relevant geographic market

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III.

We now turn to the district court's rulings granting summary judgment in favor of the defendants. We consider the court's rulings on the plaintiffs' antitrust claims,[28] and then the court's treatment of the plaintiffs' fraud claims.

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is the largest market for which data are available and facilitate a more comprehensive understanding of what transpired in the State of Alabama." This is contrary to law and scholarship; the relevant geographic market is the market that includes "producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant's product or services." Levine v. Central Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1552 (11th Cir.), cert. denied, 519 U.S. 820, 117 S.Ct. 75, 136 L.Ed.2d 34 (1996) (quoting IIA Phillip E. Areeda et al., Antitrust Law ¶ 530a, at 150 (1995)). Whether the litigants in a particular case are able to compile data regarding a particular market is irrelevant to the market definition analysis. See also Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1573 (11th Cir.1991) (discussing geographic market definition process in detail). We express no opinion as to whether the market definition that Lanzillotti actually used in his analysis is the one that he professed to use in his report; nor do we express any opinion as to whether the use of the professed market definition would have any derogatory effect upon the reliability of his testimony. We merely point out that the sort of market definition that Lanzillotti professed to use in his report — one with an apparent eye toward litigation — is inaccurate.

28. As explained in note 8, supra, our disposition of the plaintiffs' state-law antitrust claims is identical to our disposition of their federal antitrust claims.

Appendix A

A.
1.

We first take up the district court's entry of summary judgment in favor of Jones Chemicals. The district court concluded that summary judgment in favor of Jones Chemicals was warranted because Jones "do[es] not have that much economic power to make a conspiracy stick." Harcros, 877 F.Supp. at 1535. We read this statement as an indication that the district court, viewing the evidence in the light most favorable to the plaintiffs, concluded that the trier of fact could not find for the plaintiffs and against Jones on the basis of the economic and statistical evidence and on the basis of other circumstantial evidence (such as memoranda and other documents that, the plaintiffs assert, indicate attempts by the defendants to establish and maintain the alleged conspiracy). If this was the district court's conclusion, we hold that the court erred for the reasons discussed in part III.A.3, infra.

More importantly, we hold that the entry of summary judgment in favor of Jones Chemicals must be reversed because Robert Jones' admissions to the Cassassas constitute powerful direct evidence that Jones Chemicals was involved in collusive behavior in the Alabama chlorine market during the mid-1980s. In the absence of overwhelming evidence to the contrary (and as discussed infra, we conclude that no overwhelming evidence has been produced by the defendants), the trier of fact could well find in favor of the plaintiffs against Jones Chemicals on the basis of these admissions alone. The district court's entry of summary judgment in favor of Jones Chemicals on the plaintiffs' several antitrust claims is therefore reversed.

2.

We next turn to the entry of summary judgments in favor of Van Waters and PB & S. The district court correctly pointed out that PB & S

> was a nonplayer in the "South Alabama" submarket, as defined by plaintiffs, and had only a handful of sales in the North Alabama market. PB & S had no business in South Alabama and the Florida Panhandle area, and won only three bids in North Alabama from 1984-1990. It had a nonexistent market share from 1985 to 1990, the period of the purported conspiracy. PB & S was not a player in sales to municipalities. Plaintiffs have produced no evidence that PB & S was motivated to, participated in, or benefited from a conspiracy.

Harcros, 877 F.Supp. at 1535. The record reflects that Van Waters also had a zero or near-zero market share in Alabama during the period of the alleged conspiracy. See id. at 1527-28. As the district court pointed out, Van Waters' and PB & S' participation in a conspiracy that garnered them zero or near-zero market shares would be irrational. The plaintiffs and their experts assert that Van Waters and PB & S participated in the alleged conspiracy because they were afforded a quid pro quo; these two companies, the plaintiffs assert, were allotted extra chlorine contracts in markets outside Alabama in exchange for their participation in the collusive behavior in Alabama. The plaintiffs have put forward no evidence, however, to show any such quid pro

quo or even to show that Van Waters' and PB & S' market shares increased elsewhere. The appellants' case against Van Waters and PB & S thus amounts to an allegation that those two defendants took part in a conspiracy that earned them zero market share and zero dollars. There is no direct evidence against these two, and the circumstantial evidence, including the plaintiffs' expert testimony, does not support the conclusion that Van Waters and PB & S participated in a conspiracy that excluded them from the market. No trier of fact could find against Van Waters and PB & S on such a basis.[29] The entry of summary judgment in favor of Van Waters and PB & S on the plaintiffs' antitrust claims is therefore affirmed.

3.

We now turn to the plaintiffs' antitrust claims against Industrial and Harcros. The documentary circumstantial evidence proffered by the plaintiffs is not alone sufficient

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29. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) ("It follows from these settled principles that if the factual context renders [plaintiffs'] claim implausible — if the claim is one that simply makes no economic sense — [plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary."); Eastman Kodak Co. v. Image Technical Svcs., Inc., 504 U.S. 451, 468-69, 112 S.Ct. 2072, 2083, 119 L.Ed.2d 265 (1992) ("Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury. . . . If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted."); Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1534 (11th Cir.1987) ("Matsushita dictates that if the alleged conspiracy is economically infeasible or irrational then, as a matter of law, summary judgment must be entered against the plaintiff.").

to take Industrial or Harcros to trial because none of the documentary evidence supports the inference that the defendants colluded to fix prices in the Alabama repackaged chlorine market. The Caine affidavit, for instance, says nothing about Industrial's motivation in passing on the Mobile contract. Industrial argues that it withdrew its bid to avoid conflict with its supplier, Jones Chemicals, and Caine's affidavit would not enable a trier of fact reasonably to reject Industrial's contention and accept that of the plaintiffs. Likewise, memoranda showing that Joe Ragusa exercised strict control over chlorine pricing at Harcros support an inference that Ragusa was frustrated with his subordinates' failure to follow an innocuous allocation of responsibility as easily as they support an inference that Harcros centralized pricing authority in Ragusa in order to conceal the alleged conspiracy from other employees. Like these memoranda and the Caine documents, the rest of the plaintiffs' circumstantial documentary evidence is in equipoise, and in the absence of further evidence of collusion, summary judgment against the plaintiffs would be in order. See James v. Otis Elevator Co., 854 F.2d 429, 432 n. 3 (11th Cir.1988) ("A fact that can only be decided by a coin toss has not been proven by a preponderance of the evidence, and cannot be submitted to the jury."); Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 558 (5th Cir.1980) (requiring that circumstantial evidence "support an inference of the existence of an agreement" in order for claim of unlawful boycott to survive summary judgment).[30]

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30. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Viewing the plaintiffs' experts' proffered data and testimony in addition to the documentary evidence, however, we conclude that the plaintiffs' circumstantial evidence is sufficient to take their antitrust claims agains: Harcros and Industrial to trial. It is settled law that a threshold requirement of every antitrust conspiracy claim, whether brought under section 1 or section 2 of the Sherman Act, is "an agreement to restrain trade. To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.' " Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir.1991) (quoting American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946)). "We recognize that it is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators," Seagood, 924 F.2d at 1573-74,[31] and from other circumstantial evidence (economic and otherwise), such as barriers to entry and other market conditions. When a plaintiff seeks to prove a conspiracy by inference, courts must be mindful that

> "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994,

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31. See also DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1515 (11th Cir.1989).

> 8 L.Ed.2d 176 (1962). But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Id., at 764, 104 S.Ct., at 1470. See also [First National Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 280, 88 S.Ct. 1575, 1588, 20 L.Ed.2d 569 (1968)]. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S., at 764, 104 S.Ct., at 1471. [Such plaintiffs], in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. See Cities Service, supra, 391 U.S., at 280, 88 S.Ct., at 1588.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986). This circuit applies these observations to section 2 conspiracy claims as well. See Seagood, 924 F.2d at 1573-74.

A specific standard has developed for application to cases, such as the instant case, in which the defendant

oligopolists[32] assert that evidence seeming to indicate collusion in fact reflects only a pattern of uniform business conduct known as "conscious parallelism." The Supreme Court has defined conscious parallelism as a "process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S.Ct. 2578, 2590, 125 L.Ed.2d 168 (1993). In other words, conscious parallelism is the practice of interdependent pricing in an oligopolistic market by competitor firms that realize that attempts to cut prices usually reduce revenue without increasing any firm's market share, but that simple price leadership in such a market can readily increase all competitors' revenues. See Coleman v. Cannon Oil Co., 849 F.Supp. 1458, 1467 (M.D.Ala.1993) (quoting VI Phillip E. Areeda et al., Antitrust Law ¶ 1410b (1986)); VI Areeda, supra, ¶ 1429a-b.

"[I]t is well settled in this circuit that evidence of conscious parallelism [alone] does not permit an inference of conspiracy unless the plaintiff [either] establishes that,

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32. The parties agree that the market for repackaged chlorine in Alabama is oligopolistic. See Harcros, 877 F.Supp. at 1509. An oligopolistic market may be defined as a market in which "the dominant participants . . . engag[e] in interdependent or parallel behavior and [have] the capacity effectively to determine price and total output of goods or services." Republic of Tex. Corp. v. Board of Governors of the Fed. Reserve Sys., 649 F.2d 1026, 1044 & n. 32 (5th Cir. Unit A June 1981) (quoting United States v. Marine Bancorporation, 418 U.S. 602, 630, 94 S.Ct. 2856, 2874, 41 L.Ed.2d 978 (1974)).

assuming there is no conspiracy, each defendant engaging in the parallel action acted contrary to its economic self-interest,"[33] Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 n. 30 (11th Cir.1991),[34] or offers other "plus factors" tending to establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices or otherwise restrain trade. See Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1583 (11th Cir.1988);[35] Gainesville

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33. For the sake of clarity, we read this reference to a defendant's "economic self-interest" as a reference to what that defendant's legitimate economic self-interest would be under the assumption that it acted alone; a price-fixing conspiracy, if successfully implemented, is in the collective self-interest of the conspirators. Cf. Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 826-27 (11th Cir.1990) ("[T]he plaintiff must establish that each defendant would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action."); ABA Section of Antitrust Law, Antitrust Law Developments 10 & n. 51 (4th ed.1997).

34. The second sentence of note 30 in Todorov reads: "Conscious parallelism is uniform business conduct by competitors that permits a court to infer the existence of a conspiracy between these competitors." We read this, in accordance with the remainder of that footnote and with the established law and scholarship on the point, to state only the first part of the test; that is, consciously parallel behavior permits a court to infer the existence of a conspiracy only in the presence of "plus factors," such as the implausibility that the defendants would have acted as they did had they not been unlawfully conspiring in restraint of trade.

35. The district court read Dunnivant to require plaintiffs to show that the defendants' actions were contrary to their legitimate

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economic self-interest, in addition to showing "plus factors" that tend to exclude the possibility that the defendants were merely practicing conscious parallelism. See Harcros, 877 F.Supp. at 1522-23. There is support for such a reading in the wording of Dunnivant. As explained in the text, however, we read Dunnivant, in accordance with the bulk of the law on point and with eminent scholarship, to establish only that the plaintiff either must prove that the defendants' actions were contrary to their legitimate economic self-interest or must show other "plus factors" tending to exclude the possibility of lawful action. See Gainesville Utils., 573 F.2d at 300-02; VI Areeda, Antitrust Law ¶ 1434, at 213-221 (noting on p. 213 that, "[w]ith rare exception, the courts have been very clear that mere parallelism, including interdependent conscious parallelism[,] cannot support a conspiracy finding unless there are additional or 'plus' factors."); ABA, Antitrust Law Developments 8-14. In other words, whether the defendants' actions were contrary to their legitimate economic self- interest is only one prominent "plus factor" that plaintiffs may attempt to prove.

Our review of this circuit's law on point did disclose the following statement from Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 826 (11th Cir.1990): "The rule in this circuit is that evidence of conscious parallelism does not permit an inference of conspiracy unless the plaintiff establishes that each defendant engaging in the parallel action acted contrary to its economic self-interest." As explained in the preceding paragraph, a showing that the defendant acted contrary to its legitimate economic self-interest, see supra note 33, is sufficient to satisfy the requirement that the plaintiff show "plus factors" beyond mere consciously parallel action. Other "plus factors," however, may also exist.

On a different note, we observe that the district court cited our decision in Helicopter Support Systems., Inc. v. Hughes
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Utils. Dep't v. Fla. Power & Light Co., 573 F.2d 292, 300-02 (5th Cir.1978); Donald F. Turner, The Definition of Agreement Under the Sherman Act: "Conscious Parallelism" and Refusals to Deal, 75 Harv. L.Rev. 655, 659 (1962) ("Even the fact that competitors have knowingly charged identical prices is a neutral fact in the absence of evidence which would lead one to expect that the prices would have been different if truly independent decisions

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Helicopter, Inc., 818 F.2d 1530, 1534 & n. 4 (11th Cir.1987), as support for its addition of another prong to the established test for finding an agreement to restrain trade: that the plaintiff is required to "exclud[e] the possibility of independent action on the part of the defendants." See Harcros, 877 F.Supp. at 1532. This citation was erroneous for two reasons. First, the language that the district court relied upon was addressed to plaintiffs who bring distributor-termination claims; that type of claim was not brought in this case. See Helicopter Support, 818 F.2d at 1534 ("[T]he plaintiff in a distributor-termination case must also be able to point to evidence which tends to exclude the possibility that the manufacturer was operating independently in making his determination to terminate the distributor."). In addition, the Helicopter Support language merely restated Matsushita's requirement (drawn from Monsanto) that the plaintiff show that an inference of conspiracy is reasonable, i.e., that the plaintiff allege a plausible conspiracy that is sufficiently supported by the circumstantial evidence. See Helicopter Support, 818 F.2d at 1533 (after noting that evidence excluding independent action is required by Monsanto, we stated that, "[i]n short, Monsanto establishes that conduct which is as equally consistent with permissible competition as it is with an illegal conspiracy does not, without more, support even an inference of conspiracy."). Helicopter Support, therefore, does not provide a basis for grafting an additional requirement onto the established test.

had been made."). The requirement of "plus factors" is necessary because evidence of consciously parallel behavior alone leaves the circumstantial evidence of collusion in equipoise; consciously parallel behavior by oligopolists does not in itself support an inference of agreement, of "a meeting of the minds," any more strongly than it supports an inference of legal price maintenance or leadership. Thus, this requirement "ensures that unilateral or procompetitive conduct is not punished or deterred." Todorov, 921 F.2d at 1456 n. 30.

The circumstantial evidence in the instant case — that is, the documentary evidence and the plaintiffs' experts' data and testimony — will thus be sufficient to take the price-fixing claims against Harcros and Industrial to trial if it meets the above standard. In sum, the plaintiffs first must produce evidence showing that the defendants engaged in consciously parallel action. Second, the plaintiffs must show "plus factors" that tend to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism. One prominent "plus factor," to which antitrust plaintiffs often take recourse, is a showing that the defendants' behavior would not be reasonable or explicable (i.e. not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade — that is, that the defendants would not have acted as they did had they not been conspiring in restraint of trade. See, e.g., Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-42, 74 S.Ct. 257, 259-60, 98 L.Ed. 273 (1954).

We hold that the circumstantial evidence adduced by the plaintiffs against Harcros and Industrial satisfies this standard. For all the inadequacies of the record on appeal,

it suffers from no shortage of evidence of consciously parallel behavior in the market; most importantly, Garner and McClave's data and testimony reveal that prices in the market moved in a notably parallel fashion during the period of the alleged conspiracy, and that prices uniformly rose during that period much more quickly than the defendants' costs. In addition, the fact that the chlorine-buying municipalities publicly announced the bid submitted by each competitor constitutes evidence that these defendants were conscious of each other's prices during this period.

The necessary "plus factor" is established by the high and rising incumbency rates demonstrated by McClave's data;[36] these rates peaked at over 90 percent during the middle of the period of the alleged conspiracy in the southern Alabama submarket, and at nearly 90 percent in the northern submarket, during a period of stable costs, high and rising prices, and high and rising profits.[37] Oligopolists

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36. Cf. Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1245 (3d Cir.), cert. denied sub nom. Moyer Packing Co. v. Petruzzi's IGA Supermarkets, Inc., 510 U.S. 994, 114 S.Ct. 554, 126 L.Ed.2d 455 (1993) (in finding that defendants' refusal to bid on existing accounts as aggressively as new accounts constituted a plus factor, the court stated: "absent an agreement it does not make economic sense for defendants not to bid on an account, unless they have some problem like capacity or they know that the existing price is too high."); id. at 1246 ("It is one thing for competitors all to charge the same price, as a perfectly competitive market could lead them to do so. It is quite another for competitors all to refrain from soliciting each other's accounts."); VI Areeda, Antitrust Law ¶¶ 1420d & 1420' (1986 & Supp.1997).

37. The plaintiffs also point to other evidence that, they assert, supports the existence of two additional "plus factors": delivered

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behaving in a legal, consciously parallel fashion could achieve high and rising prices, even as costs remained stable, by engaging in price leadership. See VI Areeda, Antitrust Law ¶ 1429, at 176. The odds that they could achieve a price and profit increase and maintain incredibly high incumbency rates — that is, maintain the very same distribution of municipal contracts year after year — are minuscule, however, unless the oligopolists were communicating with one another.[38] In sum, this combination of high profits and high incumbency would not be likely to

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pricing (i.e., pricing that includes all transportation costs) and departure from the business practices that prevailed before the period of the alleged conspiracy. (The remainder of the plaintiffs' asserted "plus factors" are certainly no more supportive of an inference of collusion than of an inference of conscious parallelism.) We do not consider whether delivered pricing and departure from previous business practices do in fact establish "plus factors" in this case, however, because our conclusion regarding incumbency rates in the market suffices to support the holding we reach today.

38. Defendant Van Waters astutely points out in its brief that, if the defendants had wished to conspire, it would have been smarter to "rotate incumbencies," i.e., to alter the distribution of contracts from time to time in order to minimize incumbency rates and prevent a holding such as the one we reach today. We agree (although we also point out that such an arrangement likely would have required more explicit, and hence more dangerous, collusion); nonetheless, the high incumbency rates exhibited in the market would not likely have occurred in the absence of some sort of communication among the defendants. Those rates therefore establish the necessary "plus factor."

occur if the defendants[39] either were vigorously competing with each other or were engaging in competitive price leadership. It would be permissible for a jury to find, therefore, that the defendants were not in fact competing for contracts but were concertedly protecting each others' incumbencies and pushing up prices.

We therefore conclude that the circumstantial evidence produced by the plaintiffs establishes Harcros' and Industrial's consciously parallel behavior in the market for chlorine in Alabama. We further conclude that the evidence of very high incumbency rates in the market during the period of the alleged conspiracy, at a time of high and rising prices and profits but stable costs, establishes the necessary "plus factor" tending to exclude the possibility that the defendants were merely engaging in conscious parallelism. We therefore reverse the district court's entry of summary judgment in favor of Industrial and Harcros on the plaintiffs' antitrust claims.

B.

Finally, we review the district court's entry of summary judgment on the plaintiffs' fraud claims. The plaintiffs brought two types of fraud claims against the defendants. First, the plaintiffs claimed that the defendants committed fraud by sending to the municipal authorities letters

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39. In this part of the opinion we review the district court's entry of summary judgment on the antitrust claims against Harcros and Industrial. As stated in part III.A.1, however, this discussion applies to Jones Chemicals as well.

apologizing for price increases and claiming that all price increases were the result of increasing costs.[40] Second, the plaintiffs asserted that the defendants committed fraud by signing bid documents that included clauses in which the defendants represented to the plaintiff municipalities that the bids being submitted were not the result of collusive behavior.[41] The district court tersely rejected the plaintiffs' fraud claims: "Having ruled there is no conspiracy, the court finds there can be no fraud for failure to disclose it." Harcros, 877 F.Supp. at 1537. We first note that this finding is an insufficient ground for granting summary judgment on the claims that arise out of the price increase letters; those claims do not depend upon the existence of a conspiracy because the plaintiffs could potentially prove that the representations made — that price increases were due to cost increases — were false without also proving

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40. One such letter, from Jones Chemicals, read:

> Although it in no way reflects the wishes of Jones Chemicals, we find it necessary to adjust our selling prices from time to time in order to keep up with the ever increasing cost of staying in business as a reliable source of chemicals.

41. One such clause, included in a bid document executed by Harcros for the benefit of the City of Lafayette, stated:

> I hereby affirm I have not been in any agreement or collusion among bidders or prospective bidders in restraint of freedom of competition, by agreement to bid at a fixed price or to refrain from bidding, or otherwise.

that the defendants conspired to bring about the referenced price increases by collusive behavior. We therefore vacate the district court's entry of summary judgment as to the fraud claims based on the defendants' letters. We remand for a determination of which claims are supported by evidence of representations by specific defendants to specific plaintiffs. The claims that are supported by the record must go to trial.

Furthermore, because we hold that the plaintiffs' antitrust claims against Harcros, Industrial, and Jones survive summary judgment, we vacate the district court's entry of summary judgment as to all of the plaintiffs' fraud claims with support in the record that are based upon these three defendants' alleged concealment of a price-fixing conspiracy.[42] We remand for the district court to determine which of these defendants submitted bid documents containing the allegedly false representations to which plaintiffs, and thus which fraud claims of this second type should go to trial.[43]

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42. Because we affirm the district court's entry of summary judgment on the antitrust claims against Van Waters & Rogers and PB & S, we also affirm its entry of summary judgment on the plaintiffs' claim that these two defendants made fraudulent representations of non-collusion in bid documents.

43. In its order granting summary judgment, the district court also held that the defendants' fraud, if it occurred, was excused by the lack of a "confidential relationship with the plaintiffs requiring disclosure of the existence of a conspiracy." Harcros, 877 F.Supp. at 1537. The court cited Lowder Realty, Inc. v. Odom, 495 So.2d

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Appendix A

IV.

For the foregoing reasons, we REVERSE the district court's exclusion of the testimony of Loraine and Peter Cassassa, REVERSE the district court's exclusion of the affidavit of O.W. Caine, and AFFIRM the district court's exclusion of the testimony of Barbara Krysti. We REVERSE in part the district court's exclusion of the data and testimony of Perry Garner and James McClave, and AFFIRM in part. On the basis of the evidence as it appears now that the admissibility questions are settled, we REVERSE the district court's entry of summary judgment on the plaintiffs' antitrust claims against Jones Chemicals, Harcros, and Industrial. We AFFIRM the district court's entry of summary judgment on the plaintiffs' antitrust claims against Van Waters and against PB & S. Finally, we AFFIRM the district court's entry of summary judgment on the plaintiffs' claim that Van Waters and PB & S made fraudulent representations of non-collusion in bid

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23, 26 (Ala.1986); Holdbrooks v. Central Bank of Ala., N.A., 435 So.2d 1250, 1252 (Ala.1983); and Tonsmeire v. Tonsmeire, 285 Ala. 454, 233 So.2d 465, 468 (Ala.1970), in support of this proposition. These cases, and the doctrine they reflect, require that a close relationship exist between two parties before there arises a duty to disclose — that is, not to remain silent — about facts material to the relationship. See id. In the instant case, however, the plaintiffs allege not that the defendants merely failed to speak up about the alleged conspiracy, but that the defendants made affirmative and explicit misrepresentations to them regarding the existence of the conspiracy and the defendants' costs. These cases, and the doctrine underlying them, are therefore inapposite.

documents. In all other respects, we VACATE the district court's entry of summary judgment on the plaintiffs' fraud claims against the defendants and REMAND for further proceedings in accordance with this opinion.

SO ORDERED.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED FEBRUARY 22, 1995

CITY OF TUSCALOOSA; Municipal Utilities Board of Albertville; The Water Works and Sewer Board of the City of Birmingham; Water Works & Sewer Board of the City of Centre; The City of Dothan, a municipal corporation; The Water Works and Sewer Board of the City of Gadsden; The Utilities Board of the City of Gulf Shores; The City of Huntsville Water Works Utility Board; The Water Works Board of the City of Leeds; The Board of Water and Sewer Commissioners of the City of Mobile; The Board of Water & Sewer Commissioners of the City of Saraland; City of Sheffield; City of Vernon Water and Sewer Board; City of Phenix City; The City of Alexander City; The Water Works Board of the City of Arab; Baker Hill Water Authority; Calhoun County Water and Fire Protection Authority; Dallas County Water and Sewer Authority; Central Elmore Water Authority; City of Fairhope; Geneva Water Works and Sewer Board; The Water Works and Sewer Board of the City of Greenville; Town of Hayneville; Jefferson County, Alabama; The Utilities Board of the City of Muscle Shoals; North East Morgan County Water and Fire

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Protection Authority; Perdido Bay Water, Sewer, and Fire Protection District; The Water Works, Sewer and Gas Board of the City of Scottsboro; Utilities Board of The Town of Citronelle d/b/a South Alabama Utilities; The Water and Sewer Board of the City of Talladega; Tri-Community Water System; The Waterworks and Sewer Board of the City of Pritchard; and The Waterworks and Sewer Board of the Town of Westover,
Plaintiffs,
Auburn Water Works Board; Jasper Water Works and Sewer Board, Inc.; Opelika Water Works Board; The Water Works and Sanitary Sewer Board for the City of Montgomery; and The Water Works and Sewer Board of the City of Selma,
Plaintiff Intervenors,
v.
HARCROS CHEMICALS, INC.; Jones Chemicals, Inc.; Van Waters & Rogers, Inc.; PB & S Chemical Co., Inc.; and Industrial Chemicals, Inc., Defendants.

Civ. A. No. 92-G-1614-S.

United States District Court,
N.D. Alabama,
Southern Division.

Feb. 22, 1995.

* * *

Appendix B

MEMORANDUM OPINION

GUIN, Senior District Judge.

Plaintiffs in the above-styled cause are public entities organized and located in Alabama that purchase repackaged chlorine for the treatment of drinking water, sewage, and swimming pools. Defendant chemical companies either distribute or repackage chlorine[1] within the flow of interstate commerce.[2] The sale and distribution of chlorine between these buyers and sellers is handled by submission of sealed bids[3] or by negotiation of purchase prices with one or more suppliers.

Experts for opposing parties have characterized the chlorine industry as an oligopoly selling a homogeneous product to an inelastic market on an ongoing basis.

Plaintiffs allege that a relatively small group of firms engaged in a price-fixing conspiracy with respect to price

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1. Repackaged chlorine is liquid chlorine that has been pressurized and stored in either one-ton containers or 150-pound containers for use by chlorine consumers.

2. Chlorine is imported into Alabama for repackaging and distribution to public entities. Repackaged chlorine is exported to other states.

3. Typically those companies that required bids would send their specifications to the companies that had submitted bids in the past, request that bids be submitted by a certain date and time, and then publicly open the bids and announce what each competitor had bid. The effect of this public disclosure was to make known to all companies in the market what each company had bid.

in sealed bid auctions for municipal chlorine procurement in Alabama from 1984 to 1990. Most of the defendants are relatively large, publicly held, for-profit corporations. They repackage chlorine into one-ton and 150-pound cylinders for use in water treatment and other industrial applications. The defendants enjoy substantial nonmunicipal business. They buy raw chlorine at similar prices from a small group of upstream chemical manufacturers and face similar costs and inelastic demand. Rivalry between suppliers is continuous and ongoing, with the same group of firms, usually joined by "outsiders,"[4] facing each other repeatedly. All defendants issued price lists for use by their sales representatives during the relevant period. Most sales were made at the list prices. All firms were interested in the pricing strategies of their rivals. New competitors found low barriers to entry into the market area.

It is plaintiffs' contention that defendants implemented their pricing agreement by confining pricing to a few individuals. Joe Ragusa[5] was denominated as the Harcros Chemicals official to control pricing. Richard Perry[6] was

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4. Defendants Van Waters & Rogers, Inc. and PB & S Chemical Co., Inc. are arguably "outsiders" in the Alabama chlorine market. They do not have a chlorine repackaging plant or centrally-located warehouse in Alabama. They bid infrequently and sold to very few customers in Alabama during the alleged conspiracy period.

5. Harcros Vice-President Southeast Region.

6. Plaintiffs maintain Perry was solely responsible for chlorine pricing although his general job was quality control.

the individual at PB & S Chemical Company. Robert and Jeff Jones controlled pricing at Jones Chemicals.[7] Darwin Simpson[8] was Van Waters & Rogers' named official.

Mr. Simpson has stated that market conditions dictated chlorine price.

Defendant Harcros Chemicals, Inc. [hereinafter Harcros],[9] is a chlorine repackager organized under the laws of Delaware with its principal place of business in Kansas. It has sold repackaged chlorine to industrial and municipal customers in Alabama since the 1960's.

Defendant Van Waters & Rogers, Inc. [hereinafter Van Waters][10] is a chlorine repackager organized under the laws

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7. Robert Jones, deceased, was president of Jones. Jeff Jones is his son.

8. Eastern regional manager for McKesson/Van Waters. From 1982 through 1985, Mr. Simpson had chlorine pricing authority for Florida, Georgia, North and South Carolina, most of Virginia, the eastern two-thirds of Tennessee, and some central and northern parts of Alabama. From January through October of 1986 he had pricing authority from Maine to Miami and the southeast quadrant of the United States. In October 1986, his pricing authority over Louisiana, Arkansas, Memphis and Tennessee was cut back. About 1990 he regained these areas.

9. Formerly known as Thompson-Hayward Chemical Co. For purposes of this opinion both Thompson-Hayward Chemical Co. and Harcros will be referred to as Harcros.

10. Van Waters & Rogers is the successor by the 1986 acquisition of Moreland-McKesson Chemical Company. For purposes of this opinion both are referred to as Van Waters.

of the State of Washington with its principal place of business in Washington.

Defendant Industrial Chemicals, Inc. [hereinafter Industrial], a chlorine distributor for defendants Jones and PB & S, is organized under the laws of the State of Alabama with its principal place of business in Alabama.

Defendant Jones Chemicals, Inc. [hereinafter Jones] is a chlorine repackager organized under the laws of the State of New York with its principal place of business in New York.

Defendant PB & S Chemical Company, Inc. [hereinafter PB & S] is a chlorine repackager[11] organized under the laws of the State of Kentucky with its principal place of business in Kentucky.

Plaintiffs allege the defendants have conspired across state lines to violate federal and state antitrust laws to restrain trade in or affecting interstate commerce by fixing prices, allocating markets, and rigging bids for the sale of repackaged chlorine to public entities, including the plaintiffs, in the state of Alabama. 15 U.S.C. §§ 1, 2; 15 U.S.C. § 26; and Ala.Code § 6-5-60 (1993). The complaint contends that a horizontal arrangement to restrain trade existed among chlorine repackagers/distributors in Alabama during the 1980's for the purpose of establishing higher prices than would otherwise prevail.

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11. Chlorine is only one of two to three thousand products which PB & S sells throughout the United States. It is one of approximately two hundred commodity type chemicals sold by PB & S.

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Specific allegations follow:

1. The defendants violated section one of the Sherman Act by exchanging price information for the sale of repackaged chlorine to Alabama public entities;[12] allocating contracts or winning bids in geographic markets; refusing to deal with the plaintiffs; and submitting complementary, noncompetitive, or identical bids to public entities; and

2. The defendants fraudulently concealed their illegal conspiracy by submitting prearranged, complimentary losing bids for the supply of repackaged chlorine, giving the illusion of free market competition;[13] conducting secret activities in furtherance of the conspiracy; confining knowledge of the conspiracy to a small number of key officials of the defendants; and testifying falsely under oath about their bid rigging scheme during an investigation and prosecution of civil actions by the Attorney General of Florida.

In an effort to prove their case plaintiffs have outlined seven structural conditions that facilitated the conspiracy:

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12. The Sherman Act prohibits express agreements and monopoly. Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, __, 113 S.Ct. 2578, 2591, 125 L.Ed.2d 168, 190, reh'g denied, 509 U.S. 940, 114 S.Ct. 13, 125 L.Ed.2d 765 (1993) (emphasis added). The Sherman Act does not prohibit firms in a concentrated market from coordinating their behavior and sharing monopoly power to obtain supracompetitive profits unless there is an express agreement. Id.

13. Plaintiffs' amended complaint alleges fraud under Ala.Code § 6-5- 100, et seq. (1975).

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1) Presence of oligopoly makes price conspiracy easier to accomplish; 2) Product homogeneity simplifies a collusive price agreement; 3) Sealed bidding makes collusion more likely because a cheater cannot hide a price cut; 4) Inelastic demand for chlorine facilitates collusion; 5) Static demand of purchases of chlorine by Alabama public entities establishes their demand in the 1980's was stable and predictable; 6) High barriers to entry in the repackaging industry make conspiracy plausible; and 7) Conspirators' similar costs make chlorine conspiracy plausible.

An intervenor complaint was filed October 7, 1992, and amended October 19, 1992. On December 7, 1992, the complaint was amended to add additional defendants. During the period of discovery the court granted motions to dismiss complaints filed on behalf of several plaintiffs and dismissed Mayo Chemical Company as a defendant. The parties now stand as listed in the style of the case.

Based on the allegations set forth, plaintiffs seek compensatory damages for defendants' "illegal conspiracy to restrain trade by fixing prices, allocating markets, and rigging bids for sale of repackaged chlorine." They seek a permanent injunction to restrain such behavior plus compensatory damages for fraudulent practices associated therewith.

On August 22, 1994, Industrial filed a motion for summary judgment. Jones and Van Waters joined Industrial's motion. On August 25, 1994, PB & S filed a motion for summary judgment, followed by a motion by Harcros the next day. These motions are now before the court, as well

as motions to exclude proffered expert testimony of Dr. Robert F. Lanzillotti,[14] Dr. James T. McClave,[15] and Mr.

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14. Robert F. Lanzillotti. Dean Emeritus, Eminent Scholar Professor of American Economic Institutions and Director, Public Policy Research Center, Graduate School of Business, University of Florida, 1986-Present. Dartmouth College B.A.1943. American University, B.A., M.A., 1946,47. University of California at Berkley, Ph.D. 1953. Dr. Lanzillotti has served as a business consultant to varied businesses and law firms and divisions of various state and federal agencies. He has written numerous books and papers on economics.

According to Lanzillotti, "Economists only deal with the phenomena they see, costs and prices and the other variables. . . ."

15. Dr. McClave is a statistician. He taught business and economic statistics for ten years at the University of Florida, "including basic econometric modeling (economics and statistics), to students majoring in economics and other fields of business. He has written six textbooks, including one, in its sixth edition, entitled Statistics for Business and Economics."

Dr. McClave founded Info Tech in 1977 and has served as its president since that time. The company now has approximately 50 employees. According to the introduction of his report, Info Tech "performs litigation consulting and software development, and its mission has involved analysis of antitrust behavior in sealed bid markets since its inception."

Dr. McClave's job at Info Tech "has been to develop computerized statistical and economic tools to assist in the litigation of antitrust cases." He became involved in this endeavor as a result of a research grant received in 1977 under the sponsorship of the

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Perry Garner,[16] and to strike the declaration of Barbara Krysti.

I. CASE HISTORY

Prior to the institution of this suit the United States Justice Department convened a grand jury to investigate the chlorine industry, subpoenaing thousands of documents from the defendants in this case and from others. Numerous witnesses were questioned. After a lengthy investigation, the Justice Department dropped its investigation and returned the documents to their owners.[17]

A 1989 investigation of the chlorine industry by the Florida Attorney General resulted in the filing of two federal antitrust suits: the "peninsula" case filed in Jacksonville, Florida, and the "panhandle" case filed in Pensacola, Florida. After reading summary judgment briefs and hearing oral arguments in the "panhandle" case, Judge Vinson

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U.S. Department of Justice and administered by the Florida Attorney General's office. Dr. McClave has been qualified as an expert in statistics and econometrics in a number of federal and state courts, including at least 40 antitrust cases. Dr. McClave never studied economics in graduate school. His peers are others with Ph.D.'s in statistics. He himself admits he is not qualified to testify on economic theory.

16. C.P.A.

17. The Justice Department did not drop its investigation until after this suit had been filed.

announced he would grant defendants' motion for summary judgment. At that point the State of Florida agreed to settle both cases for partial recovery of its litigation expense.[18] The instant case, filed July 15, 1992, had been filed prior to the Florida settlement.[19]

II. DIRECT EVIDENCE

Aside from the testimony of plaintiffs' experts, there is no direct evidence of any conspiracy. Dr. Lanzillotti himself testified he had no information there had been any meetings or direct communications, i.e. notes, letters or telephone calls, between any of the defendants concerning

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18. Industrial refused to contribute anything to the settlement.

19. Alabama's then Attorney General Don Siegelman solicited Alabama municipalities to authorize him as Attorney General to bring an antitrust action. He appointed Richard A. Arnold and John C. Hall III as Special Assistant Attorneys General with reference to "Chlorine Antitrust Litigation." T.W. Dudley Perry, Sr., was later appointed a Special Attorney General with reference to "Chlorine Antitrust Litigation." Successor Attorney General Jimmy Evans declined, on behalf of the State of Alabama, to participate in the proposed antitrust litigation. Consequently, suit was filed by individual entities that dealt with chlorine repacking and distribution companies.

Drs. McClave and Lanzillotti both testified they advised the Florida Attorney General a bid-rigging conspiracy did not exist in peninsular Florida. Defendants maintain the parties settled those "baseless lawsuits" to save litigation expenses. Even were there grounds for settlement, evidence of settlement is not admissible to prove liability. Fed.R.Evid. 408.

the pricing or allocation of chlorine or anything that would be considered conspiratorial.[20] He based his work on the bidding patterns.

Plaintiffs maintain defendants had ample opportunity to conspire at annual meetings hosted by chlorine suppliers and at various chlorine committee meetings. The allegation that defendants spoke frequently by telephone is unsubstantiated.

III. EXPERT TESTIMONY

Since there is no direct evidence of conspiracy, expert testimony must be carefully scrutinized. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Court held that the Federal Rules of Evidence provide the standard for admitting expert scientific testimony in a federal trial.

Fed.R.Evid. 402 is the baseline for interpreting the federal rules:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

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20. Although Dr. Lanzillotti asserted such discussions took place in his report, in deposition testimony he conceded he had no evidence such discussions took place.

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In Daubert the Court defined "relevant evidence" as "that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " 509 U.S. at __, 113 S.Ct. at 2794, 125 L.Ed.2d at 479. The Court went on to discuss the reliability factor of expert evidence in the following manner:

> A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." . . . Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique that has been able to attract only minimal support within the community," . . . may properly be viewed with skepticism (citations omitted).

509 U.S. at __, 113 S.Ct. at 2797, 125 L.Ed.2d at 483.

In speaking for the Court Mr. Justice Blackmun suggests the following factors, considered by the Court in the instant case, to be considered in a Fed.R.Evid. 104(a) inquiry:

> 1) Whether the theory or technique can be and has been tested;
>
> 2) Whether the theory or technique has been subjected to peer review and publication;

3) The known or potential rate of error or the existence of standards; and

4) Whether the theory or technique used has been generally accepted.

Id. at __, 113 S.Ct. at 2796-97, 125 L.Ed.2d at 483.

The Supreme Court has interpreted Fed.R.Evid. 702 as imposing two distinct requirements for the admissibility of scientific expert evidence: 1) the evidence must be reliable[21] and 2) the evidence must be relevant[22]. Daubert, 509 U.S. at __, 113 S.Ct. at 2790, 125 L.Ed.2d at 475.[23]

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21. 509 U.S. at __, __, 113 S.Ct. at 2795, 2797, 125 L.Ed.2d at 482-84. Specifically, the court's standard was that the expert's testimony reflect "scientific knowledge," "derived by the scientific method," amounting to "good science."

22. The "fit" requirement.

23. Daubert was before the Supreme Court on Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128, 1131 (9th Cir.1991) (Affirmed the district court's grant of summary judgment because the opinions proffered by plaintiffs' experts ran counter to the substantial consensus in the scientific community). Daubert remanded the case to the 9th Circuit to consider the admissibility of plaintiffs' expert testimony under Fed.R.Evid. 702, which superseded the Frye test — scientific evidence was admissible if based on a scientific technique generally accepted as reliable within the scientific community — the standard for admissibility of expert testimony in the circuit at the time. Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923). On rehearing the 9th Circuit affirmed the district court's grant of summary judgment. 1995 WL 1736 (9th Cir.).

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In pursuing allegations of trade restraints plaintiffs have relied primarily on the testimony of two expert witnesses: Dr. Robert F. Lanzillotti, economist, and Dr. James T. McClave, statistician, both of whom submitted reports prepared specifically for this litigation. Significantly, on remand the Ninth Circuit Daubert court held one "very significant" factor to consider is whether an expert is proposing to testify about research conducted independently of the litigation or developed for the purpose of testifying.

A. Lanzillotti

At the request of attorneys representing various public entities in Alabama, Dr. Lanzillotti prepared his May 20, 1994, report on the "Alabama Chlorine Litigation" — "an economic analysis of market structure and competitive behavior of repackagers of containerized chlorine (CI) in 2000# and 150# cylinders, in Alabama over the period 1980 to date." Report of Robert F. Lanzillotti on the Alabama Chlorine Litigation, May 1994, p. 1. Lanzillotti defined his task in the May 1994 report in the following manner:

> to determine whether repackagers of chlorine engaged in a scheme to fix prices or allocate customers among themselves, as outlined in the Complaint. In my opinion, the totality of the evidence adduced so far in the litigation supports the conclusion that such a conspiracy did, in fact, operate during the 1980s.

Lanzillotti Report, p. 7.

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In determining defendants were engaged in cartels and other collusive arrangements, Lanzillotti outlined basic common economic characteristics: 1) "[C]artel occurrence is most common in markets with few sellers [two to six firms] (emphasis added)." Lanzillotti Report, p. 9. 2) High concentration appears to be most conducive to cartelization efforts. 3) Conditions are most conducive to cooperation among sellers in industries selling products that are standardized or homogeneous — as repackaged liquid chlorine. 4) The elasticity of demand for a product may also constitute a condition conducive to collusion. 5) In markets in which cost components[24] are virtually the same, collusion is much easier to implement. 6) Generally, market conditions involving frequent, predictable sales are most accommodating to bid rigging and collusion. 7) The nature of sealed-bid/public announcement of winning bidder and winning bid — exemplified by identical sealed bidding, simultaneous price increases, and related practices — constitute a built-in communication network for repackagers. Lanzillotti summarized in the following manner:

> [E]conomic analysis and empirical studies indicate that the structural conditions most conducive to collusive activities are those involving a relatively small number of sellers selling homogeneous products with relatively inelastic and predictable demand and a market

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24. These components in the repackaged liquid chlorine industry are raw chlorine cost, packaging cost and cost of delivery to the customer.

> setting relatively free of rapid technological change in the nature of products, advertising, styling, etc. Moreover, the nature of the sales process, sealed competitive bidding, introduces a complication that induce [sic] sellers to resort to various collusive arrangements in order to achieve their common objectives. The liquid chlorine industry, notably the activities of repackagers/distributors fits these market conditions and product characteristics very closely; hence, it is not surprising to discover the presence of collusive activities.

Lanzillotti Report, p. 11.

In reaching a conclusion that the defendants were engaged in a conspiracy, Dr. Lanzillotti chose as his market study the entire Southeastern United States[25] with the exception of Texas, Louisiana and the peninsula of Florida. Submarkets included: (1) Alabama and the Florida panhandle, further subdivided into northern and southern markets; 2) peninsular Florida; and 3) Georgia. Lanzillotti delineated the market area by noting prices, price changes, and stability of prices, defining the broad geographic market as the Southeastern United States. The delineated market area contains at least 70 chlorine vendors. Even so, Dr. Lanzillotti acknowledges it is difficult to find a conspiracy, or cartel unless there are limited suppliers, normally two to six. Not only could he not remember having seen a cartel in

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25. According to Dr. Lanzillotti this entire area has similar pricing patterns.

a market that had more than ten vendors, he cited a study which says that 79 per cent of cartels are in markets served by ten vendors or less. In Lanzillotti's Southeast market area, however, no less than 17 different chemical companies bid for repackaged chlorine contracts in Alabama during the alleged conspiracy period. At least five chemical companies that are not defendants or identified as conspirators won bids for which plaintiffs are claiming damages.[26]

Based on his analysis of the Southeast operation generally, and Alabama specifically, Dr. Lanzillotti opined:

> The information currently available relative to the Southeast discloses that prices of containerized chlorine to these public entities in Alabama during the period in question were not determined by free and open competition among suppliers. In consequence, public entities paid higher prices than would have prevailed in a truly competitive market.

Lanzillotti Report, p. 1.

Dr. Lanzillotti identified and isolated the product and its relevant geographic markets, noting the following:

> [T]otal demand . . . is "inelastic" with respect to price, i.e., dollar sales tend to increase

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26. Apperson Chemical, American Industrial, Mid-American Chemical, Mobile S & S Co., and Southland Chemicals.

> less-than-proportionately with reductions in price. . . . Hence, given a market structure consisting of only a few major sellers, economic analysis tells us that the prices of a homogeneous [i.e., "fungible"] product like chlorine, price cuts by one seller normally will be followed by other competitors."

Lanzillotti Report, p. 2.

Lanzillotti opines that from 1984 through 1990, based on straight economic analysis and empirical pricing data, the price-cost margin reflected in the Alabama chlorine industry was noncompetitive. Non-bid customers typically paid list price.

In the case of Harcros, bids were determined primarily by branch managers. Factors considered in calculating bid amounts were distance between the company and municipality, the number of available cylinders, the cost of the product, and the prices in the market. Upon determining the price, managers contacted regional vice president Joseph Ragusa for approval of the recommended bid. The responsibility of deciding the amount of the bid was primarily with the district manager.

Lanzillotti places importance on written comments by Joseph Ragusa on memoranda received from one Harcros salesperson and forwarded to the remaining members of his sales staff (typically 10 to 15 people). Lanzillotti cited as an example of conspiratorial behavior Mr. Ragusa's January 1985 memorandum, and attached copy of

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McKesson Chemical's price list for chemicals sold in Texas and Oklahoma to his salespeople, in which he asked Harcros salespeople to be on the lookout for price lists in their areas. "I have heard that their sales people will not be allowed to deviate from these list prices without a manager's approval. If they stick to this plan, it can benefit all of us as each chemical distributor faces the same problems — rising costs such as insurance, E.P.A., etc., and low margins must be improved."[27] Lanzillotti Report, p. 15.

Lanzillotti also refers to a Ragusa notation on a memorandum written by J.L. Smith of the Atlanta Harcros office to his boss, Mike Stringer, about bid results on products, including chlorine, at Carrollton, Georgia. In a hand written notation on the March 25, 1988, Smith memorandum, Mr. Stringer noted the VW & R (Van Waters) bid of $.2750 as a "signal to get prices up." To the Stringer notation, Ragusa added: "We have an indication that VW & R trying to increase tons to $.275 lb. on tons. We need to support this move in the markets we are seeing it. Be sure to do it."[28]

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27. Defendants argue that rather than being conspiratorial, Ragusa's statements are consistent with competition in which Harcros is seeking information about the marketplace. Were there a bid rigging conspiracy, there would be no need for the sales people to be on the lookout for McKesson price lists.

28. Again defendants contend that rather than showing direct communication between Harcros and Van Waters, the notes indicate Mr. Ragusa and Mr. Stringer were reading and interpreting the prices in the market prior to deciding what was best for their company. Had there been an agreement between Harcros and Van Waters, the memoranda would not have existed.

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As evidence the defendants were exchanging price information, plaintiffs refer to two memoranda written by Mr. Ragusa in April 1985 in which he mentions a new Jones price list.[29] Lanzillotti opined exchanging of price lists was not limited to Harcros. "PB & S regularly distributed its intended consumer bid pricing to Industrial, under the guise that their Pricing Structure to Industrial required that Industrial be given a discount off of the consumer prices."

As further examples of a pricing conspiracy, Lanzillotti noted Ragusa's comments: "Arkla & Dixie still have not discovered the new world," and "Ed Morgan at Arkla still in dark."[30]

According to Lanzillotti cross-elasticity of demand helps identify the relevant product market for antitrust purposes. Products that have a high cross-elasticity of demand are considered similar or identical products for purposes of economic analysis. Lanzillotti stated: "[I]t is my judgment that the relevant product for purposes of this

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29. Rather than having access to a Jones price list, Ragusa explained the information had been reported to him from field people who had picked up the information.

30. Ragusa explained the comments were made in relation to Arkla and Dixie's having bid $310.00/ton and $314.00/ton respectively on an account in which Harcros had bid $400.00. Ragusa's interpretation was they could make more money if they bid higher.

The court notes that comments Ragusa made relative to pricing in Georgia were speculation only.

Complaint is clearly liquid, containerized chlorine (Cl) used for treatment of water and sewage. There are no close substitutes." Lanzillotti Report, p. 3.

In discussing price differentials Lanzillotti noted acknowledgments by various personnel of defendants. Joseph Ragusa[31] conceded there was nearly a $250.00/ton difference in price between (a) panhandle Florida (approximately the same price as rest of Southeast), and (b) peninsular Florida. Mr. Ragusa attributed the disparity to "competition." He later attributed the disparity to "market conditions," as did Robert Jones, president of Jones, and Darwin Simpson of Van Waters.

In addressing the concepts of price fixing" (which can take the form of bid rigging), "collusion," and "conspiracy to restrain trade," Lanzillotti said: "Competitors who agree among themselves to rotate the winning bid, to bid purposely "low', [sic] or to bid in some other collectively determined and artificial fashion to allocate customers or territories are engaged in price-fixing under the antitrust laws." Lanzillotti Report, p. 7.

Dr. Lanzillotti contends the following factors convinced him the defendants participated in bid rigging in the repackaged chlorine market in Alabama.

> (1) signaling with complementary [sic] bids to nonincumbencies as a means of securing an

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31. As Harcros Vice President Southeast Region, Mr. Ragusa's sales territory included Florida and Alabama, as well as most of the states in the Southeast.

> agreement to raise the market price; (2) refusal to bid certain public entities; (3) a pattern of "courtesy" or "complimentary" [noncompetitive bids]; (4) frequency of identical or essentially identical bidding; (5) bidding at straight "book" or "list" price with an apparent [if not express] expectation of not winning the bid; and (6) the very sharp contrast between (a) prices in Alabama and the southeast in general and (b) peninsular Florida (and other sub-markets affected by non-conspirator Allied)[32] throughout the period under review.

Lanzillotti Report, p. 15.

Dr. Lanzillotti reached the following "ultimate conclusion:"

> Defendants were using explicit price signals through bids not intended to win contracts in order to reach an agreement to bid (and quote) higher prices, while always honoring one another's incumbencies. This is, in my opinion, explicit price fixing, since essentially there is no doubt about either the price or the intended winner of any contract (or, at least, of any contract over which the Defendants have control).

Lanzillotti Report, pp. 24-25.

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32. Allied Universal operates out of Florida. It moved into the Georgia market and then into Alabama, taking accounts from various defendants. Lanzillotti refers to Allied as the "pricing maverick."

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B. McClave

In conjunction with Dr. Lanzillotti's analysis, Dr. McClave performed an analysis of Dr. Lanzillotti's geographic markets and the product from data of bids and related data for repackaged chlorine sold to municipalities in either one-ton or 150-pound cylinders, or both. From his analysis Dr. McClave concluded vendors' collusive behavior affected the market at least as early as 1984 and continued through 1990. The conclusion of his May 20, 1994, report for the "Alabama Chlorine Case" states the following:

> Conspirators honored one another's incumbencies with great regularity throughout that period, and used price signals when bidding into non-incumbencies to communicate proposed moves to new and higher price levels. In fact, analysis of available data throughout the Southeastern market indicates that signs of noncompetitive behavior were prevalent throughout the market during that period, with exceptions only where Allied was an active bidder, or a threat to bid. The result was that public entities throughout the southeastern market in general, and in the Alabama submarket in particular, paid significantly higher prices for liquid chlorine than they would have paid in a competitive market environment.

Report of James T. McClave for the Alabama Chlorine Case, May 1994, p. 14.

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Dr. McClave did not prepare the database used in his analysis, but accepted the one prepared by Dr. Lanzillotti, embracing Lanzillotti's definition of the relevant product, geographic markets and submarkets. All of his analyses focus "on the sale of repackaged liquid chlorine to public entities in the Southeastern market," particularly "the geographic sub-market consisting of Alabama and Florida panhandle municipalities that let bids on an annual basis." McClave Report, p. 3. He further divided the submarket into "northern" and "southern" submarkets.

While Dr. McClave concluded the top eight vendors in the market had stable market shares — a sign of collusive behavior — their stable market shares were not sufficient to establish collusion. He therefore examined their bidding behavior, beginning with an analysis of the "incumbency" rate, the percentage of customers whose business is won by the same vendor from one year to the next. "[H]igh incumbency rates during a period of suspected collusive behavior, as compared with another period believed to be more competitive, support the inference of collusion during the suspicious period." McClave Report, p. 5. McClave concluded that incumbency was at the heart of the bidding behavior of the defendants. In discussing the incumbency rates for the Alabama sealed bid submarket (not including the Florida panhandle), McClave called attention to the following:

> Note that in 1981 and 1982, the rates are below 50%, meaning that more than half the bid entities were won by different vendors in each of those two years. In 1983 the incumbency rate jumps

> to 64%, drops back to 50% in 1984, then increases to 78%, in 1985. The incumbency rate peaks in 1986 at 90%, meaning that only 10% turnover in suppliers occurred throughout the year. In 1987, the rate remains extremely high at 83%. The incumbency rate never recedes below 50% again, although it returned to 75% in 1990.

McClave Report, p. 5.

McClave found a similar pattern existed in the "northern" and "southern" submarkets. Tie bids occurred on only eight percent of the 1981 contracts, jumping to 75 percent by 1983. Tie bids occurred in about 90 percent of the 1986 and 1987 contracts, falling to zero percent by 1992. He concluded: "The incumbency and tie bid rates in the Alabama chlorine sub-market are indicative of collusive behavior." McClave Report, at 6.

One aspect of plaintiffs' alleged collusion took place in the sealed bids conducted by municipalities. McClave opines the reason municipalities conduct sealed bid auctions is to obtain, within their requirements and specifications, the lowest price for repackaged chlorine. He noted the pattern of competitive behavior began to disappear in 1983, with prices rising steadily from May onward. The incumbency rate jumped to 80 percent, meaning that only two bids turned over during 1983. McClave opined that higher, less dispersed bids are "atypical of competitive markets." He cited the following:

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> By 1985, all bidders are acting in concert. The "going" price is $400 per ton, a price from which VW & R[33] never deviates. By September, everyone is bidding at this level. In 1986 the bid level moves to $450 per ton, and everyone is in line. Only where there is concern that the tie bid might not go to the incumbent does the incumbent bid slightly below the established price, as in Okaloosa (FL).

McClave Report, p. 8.

McClave cites the best examples of price signaling appeared in the 1987 "southern" submarket. Chemicals, Inc., a Jones distributor (not a defendant) signaled at $500.00 per ton in its January bid to Panama City, Florida. Van Waters responded with its signal at the same level in its April bid to Mobile, a Jones incumbency. Mayo (not a defendant) won Tuscaloosa at that level in September with Jones, Van Waters and Harcros all bidding $500.00 per ton or higher. By 1988, $500.00 per ton was firmly established. Although signals of $550.00 per ton began, McClave concluded defendants were unable to establish the $550.00 figure because of the entrance of Apperson into the market. Contract turnover remained quite low and the incidence of tie bidding quite high.

McClave accounts for Van Waters submitting 39 bids in the southern sub-market during the 1984-1990 period without winning a single bid as a prime example of "complementary" bidding: giving the appearance of more competition to the entity letting the bid, and serving as

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33. Van Waters.

effective price signals in markets in which it has incumbencies.

McClave found the "northern" submarket showed relatively coordinated bidding behavior as early as 1982 or 1983, moving to $260.00 per ton in 1983. By 1987 the $500.00 level was reached. Disintegration of the coordinated price began in 1988 when Van Waters took the Gadsden contract from Harcros by bidding $450.00, and Mayo took Birmingham from Industrial by bidding $466.00 per ton. The incumbency rate dropped to under 60 per cent. In 1989 Van Waters bid $334.00 to retain Gadsden, and Industrial bid $340.00 to reclaim Birmingham.

Having accepted Lanzillotti's economic analysis of chlorine repackaging costs and their effect on price, McClave focused on price/cost and bid relationships over the period from 1981 through 1992. He concluded winning bid prices did not follow the cost trend: "Note that the pattern of the price-cost relationship, particularly the dramatic separation of price from cost beginning in 1984, holds throughout the Southeastern market, except where Allied is active. This supports the conclusion that the effects of the collusive behavior were manifested throughout the Southeastern market." McClave Report, p. 11.

After concluding defendants had been engaged in collusive behavior in bidding and pricing, McClave provided an econo-metric model to estimate the "but for" competitive price of chlorine.

C. Summaries

Summaries of data have been submitted in conjunction with the reports of Lanzillotti and McClave. Fed.R.Evid.

1006 permits admission of such summaries.[34] In Gordon v. United States, 438 F.2d 858, 876 (5th Cir.1971), the court permitted a summary of testimony.[35] Summaries (charts) were "used as an aid in understanding testimony already introduced in the case or documents which were available." Fed.R.Evid. 1006 should be read in conjunction with Fed.R.Evid. 402.[36]

IV. HEARSAY TESTIMONY

Other than plaintiffs' proffered expert testimony, their additional evidence is in the form of hearsay testimony: (A) the Casassas' testimony about what Mr. Jones, their social acquaintance, told them; (B) a handwritten note written by an unidentified person interpreting Mr. Caine's statement that Industrial had submitted a "complimentary" bid, plus Mr. Caine's affidavit; and (C) the statement of Barbara Krysti that her husband Lloyd Krysti told her Joe Ragusa of Harcros was conspiring with his competitors to fix chlorine prices before bids were submitted.[37]

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34. "The contents of voluminous writings . . . which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."

35. Although this was prior to the adoption of the Rules, the holding is applicable.

36. "All relevant evidence is admissible."

37. Even were the three "confessions" admissible, they would not be admissible against Van Waters or PB & S. They did not employ Robert Jones, Lloyd Krysti or Woody Caine and were not implicated by the content of the "confessions." Nor would any of these "confessions" bind more than one party, even if admitted.

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A. Loraine and Peter Casassa

In an effort to prove the conspiracy, plaintiffs have provided the affidavits of Loraine and Peter Casassa, former social acquaintances and occasional golfing partners of Robert Jones, deceased.[38] The statements were purportedly

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38. The behavior of Mrs. Casassas ended the friendship between the Joneses and the Casassas. In the spring/early summer of 1985 Mrs. Casassa and a friend traveled from Florida to Caledonia, New York, to satisfy Mrs. Casassa's curiosity about Bob Jones's marital status. Representing themselves as reporters for the St. Petersburg Times, they located Bob Jones's residence and took photographs. Upon confronting Mr. Jones they demanded that he get Shirley Jones out of town. When they returned to Florida Mrs. Casassa told her husband and gossiped to her friends about Bob Jones. Mr. Jones voiced his objections over Loraine Casassa's invasion of his privacy and her subsequent rumor-mongering to Mr. Casassa. The friendship between the couples ended.

As a result Mr. Jones "threatened" the Casassas. His alleged "threat" was in reference to the Casassas' interference with his personal life. It had nothing to do with their business dealings. Plaintiffs argue the "threat" pertained to business dealings between Jones and the Casassas' firm, Chemicals, Inc. Chemicals, Inc. is not a defendant in the instant case. It only bid in the Florida panhandle area. Any relationship between Bob Jones of Jones Chemicals and the Casassas of Chemicals, Inc. has no probative value as to whether there was a conspiracy in Alabama. Furthermore, the Casassas seemed to understand that the "threat" involved their meddling in the personal relationship between Bob and Shirley Jones. Moreover, any threat made by Mr. Jones to the Casassas is inadmissible against the defendants for the following reasons: 1) The evidence does not establish a conspiracy; 2) Mr. Jones's statements could not have furthered the alleged conspiracy; and 3) The alleged statements do not identify any defendant as a conspirator.

made in their presence by Mr. Jones, then president of Jones, on the golf course and in the club house of a Florida country club. Allegedly Mr. Jones knew what the bids of unidentified competitors in unidentified markets were before the bids were submitted to unspecified customers. These out of court statements are inadmissible hearsay.

Out of court statements by alleged co-conspirators must be made "during the course and in furtherance of the conspiracy." Fed.R.Evid. 801(d)(2)(E). Our circuit succinctly outlined the time when an out of court statement by a co-conspirator is admissible against a defendant when it said:

> The Supreme Court has clarified the analysis for determining when a coconspirator's statement is made in furtherance of a conspiracy under Rule 801(d)(2)(E). Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). Before admitting a coconspirator's statement over an objection that the statement does not qualify under Rule 801(d)(2)(E), a district court must be satisfied that the party offering the testimony has proved by a preponderance of the evidence that the declarant and the defendant were involved in an existing conspiracy and that the statement was made during the course and in furtherance of the conspiracy.

United States v. Byrom, 910 F.2d 725, 734 (11th Cir.1990). See 2 J. Strong, McCormick on Evidence, § 259, at 165 (4th ed. 1992) (The statement or declaration of a

co-conspirator must have been made while the conspiracy was in progress and must have constituted a step in furtherance of the venture); 2 J. Strong, McCormick on Evidence, § 259, at 167 (4th ed. 1992) ("Preliminary questions of fact with regard to declarations of coconspirator are governed by Federal Rule 104(a)[39] and must be established by a preponderance of the evidence."). Plaintiffs have failed to prove this necessary step. Other than inadmissible hearsay testimony, no direct evidence of a conspiracy has been presented.

The Advisory Committee's Notes on Admissions under Fed.R.Evid. 801(d)(2) state: "The limitation upon the admissibility of statements of co-conspirators to those made 'during the course and in furtherance of the conspiracy' is the accepted pattern. While the broadened view of agency taken . . . might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. . . . The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved." (emphasis added).

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39. (a) Questions of admissibility generally. Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court. . . .

(Footnote not in text of quoted material.)

Even were Mr. Jones's statements admissible exceptions to the hearsay rule, they are not binding on Jones Chemical. Other than the Casassas' testimony, plaintiffs have laid no foundation to prove that the conversation took place or if it did that Jones was speaking for the company. The court assumes plaintiffs want the Casassas' statements admitted on an alter ego theory, but they have offered nothing to suggest to the court the corporate shield should be pierced. They have failed to prove the statements were made in Florida or what the Florida alter ego law is. Furthermore, they have failed to introduce evidence of the alter ego law in any state. Since the federal court is sitting in Alabama, the court has the right to apply Alabama law. In Alabama the president of a corporation is not the "alter ego" of the corporation. To be the "alter ego" the person must be the "general superintendent" or "manager." While Mr. Jones may have acted in one or both of those capacities, plaintiffs have introduced no evidence to that effect. "A person who holds the office of president of a corporation is not assumed, in the absence of evidence to the contrary, to have any authority to act or speak for the corporation." C. Gamble, McElroy's Alabama Evidence, § 195.01(7), at 522 (4th ed. 1991) (citing Jerome H. Sheip, Inc. v. Baer, 210 Ala. 231, 97 So. 698 (1923)). In an action against a corporation, the declarations or admissions of its president cannot be received to establish a liability against it. Henry & Co. v. Northern Bank of Alabama, 63 Ala. 527, 537 (1879). Accordingly, anything Mr. Jones may have said is not binding on Jones Chemical.

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B. Woody Caine[40]

The only evidence offered by plaintiffs of participation by Industrial in a conspiracy is the margin note by an unidentified person at the Board of Water and Sewer Commission of the City of Mobile to a May 5, 1987, bid tabulation which reads:

> * This is a complimentary bid[41] As per O.W. Caine, Sales Manager, pass contract on to Jones Chem. 4/28/87

The margin notation is erroneous for several reasons. It is the interpretation by an unidentified person of what Mr. Caine said, not what he said. Mr. Caine was not the sales manager; he had no authority over bids. Mr. Welch, the only person at that time responsible for bidding chlorine, had to approve Mr. Caine's quotation of something other than list price to a buyer. Caine and Welsh never spoke about this 1987 Mobile bid. Therefore, had Mr. Caine said anything about the bid it was an unauthorized statement. Significantly, Dr. Lanzillotti never mentioned the margin notation when asked to list everything that indicated that Industrial was a conspirator. The notation is inadmissible.

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40. Mr. Caine, a former Industrial employee, is now a partner in Water and Waste Specialties Co. According to his affidavit he was a Mobile and Dothan sales manager for Industrial from 1985 to 1990.

41. In the case of a complimentary bid the bidder submits a high bid so he will not be awarded the bid. A complimentary bid may be submitted in order to keep one's name on the bidding list.

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Plaintiffs have additionally offered Mr. Caine's affidavit as evidence that Jones exercised complete control over chlorine bidding by Industrial. Mr. Caine's affidavit testimony concerning the Jones/Industrial tie bid, however, is ambiguous: 1) He learned of the tie from Joyce Whitworth; 2) William Welch told him Industrial needed to bow out gracefully; 3) Caine told Mrs. Whitworth and the Mobile bid was awarded to Jones. None of his testimony establishes conspiracy. Caine admits in his declaration that Mr. Welch told him "to bow out gracefully, because it would not be to Industrial's long-range advantage to get into a fight with its supplier over this one bid." Mr. Caine adds that he "would have recommended doing the same thing." Although Industrial wanted the Mobile business, it also needed to preserve its source of supply in South Alabama. Fighting with its sole supplier in the supplier's hometown over this single bid would show bad business judgment.

The other portions of Mr. Caine's affidavit add nothing. Events setting forth what Industrial and Jones home offices did are inadmissible hearsay. Mr. Caine was not an active participant and had no first-hand knowledge. His memory of events in Jackson, Mississippi, from 1978 through April 1984, has no bearing on the case at bar. Furthermore, recitation of bid procedures followed in New Orleans from April 1984 through October 1985, when he left Industrial's employment, establish Mr. Caine had no authority over chlorine bids. At best Mr. Caine's testimony is hearsay. He has no first-hand knowledge of the procedures he recounts.

Neither can the affidavit stand alone. Mr. Caine clarified his October 7, 1994, affidavit by declaration of October

26, 1994. Had the evidence established Mr. Caine had authority over chlorine bids, his subsequent declaration establishes he never intended to suggest knowledge of a conspiracy. His declaration includes significant information not included in his earlier affidavit. "[A]ll bids that were submitted on behalf of Industrial were with the full hope of getting that business and without any knowledge of what Jones might be planning to bid." His affidavit was not meant as an admission of wrongdoing. "I was never personally involved in any bidrigging and have no knowledge of Industrial being involved in any bidrigging." His earlier reference to Industrial's giving bid information to Jones referred "to the day-to-day contacts between Industrial as a distributor and Jones as a supplier." "[T]hose contacts took place as a part of Industrial's efforts to obtain price support from Jones for long-term chlorine contracts." "[C]hlorine distributors need(ed) price support to bid competitively on long-term contracts."

For the above-cited reasons the court strikes the affidavit of Woody Caine.

C. Barbara Krysti

Plaintiffs have submitted the affidavit of Barbara Krysti, the widow of Lloyd Krysti, a former Harcros employee. By affidavit Mrs. Krysti testifies her husband told her Mr. Joseph Ragusa was "getting together with his competitors and fixing the price of chlorine before bids were submitted." Not only is no independent source for the information given, Lloyd Krysti did not have the authority to bid chlorine; Joe Ragusa did. Lloyd Krysti's statements, therefore, are not

statements within his authority. They have no probative value. Not falling within any exceptions to the hearsay rule, the double hearsay testimony of Barbara Krysti is inadmissible.

V. CASELAW HISTORY

Plaintiffs claim defendants participated in vertical restraints of trade — restraints imposed by the seller on the buyer. Pertinent to the decision of the court today is a series of cases dating to the beginning of the century. In United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), the court ruled that a manufacturer's mere advance announcement that it would not sell to price-cutters did not violate the Sherman Act.[42] "The purpose of the Sherman Act is . . . to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." 250 U.S. at 307, 39 S.Ct. at 468.

Through the years the principles governing vertical arrangements moved in the direction of condemnation by holding per se illegality. In 1977, however, in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), the court brought this era to a close when it returned to the rule of reason — a situation in which

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42. Later the court moved away from the Colgate holding, only to return to its principle in more recent years.

"the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." 433 U.S. at 49, 97 S.Ct. 2549, 53 L.Ed.2d at 580.[43]

Thereafter, in the price fixing case of Monsanto Company v. Spray-Rite, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), reh'g denied, 466 U.S. 994, 104 S.Ct. 2378, 80 L.Ed.2d 850 (1984), the Court held it was natural for a manufacturer and its dealers to communicate constantly about prices and sales tactics. Before a conspiracy to fix prices can be inferred there must be evidence to exclude the possibility that the manufacturer and distributors were acting independently. "[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' Edward J. Sweeney & Sons, supra,[44] at 111." 465 U.S. at 764, 104 S.Ct. at 1471, 79

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43. Of interest is Judge Posner's response (identified in footnote 49 on page 44) when asked if market concentration is an appropriate thing to look at in vertical restraint analysis under Sylvania: "I don't think you would want to condemn resale price maintenance or other vertical restrictions just because of a concentrated market. It is true that these vertical restrictions, particularly resale price maintenance, would make it easier to police a cartel of manufacturers, but that seems a pretty thin basis on which to condemn an industry-wide practice."

44. Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3rd Cir.1980), cert. denied, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981).

L.Ed. at 785-86. (Restated in conclusion 465 U.S. at 768, 104 S.Ct. at 1470, 79 L.Ed.2d at 788 (1984)).

Two years later, in Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 588, 106 S.Ct. 1348, 1357, 89 L.Ed.2d 538, 553 (1986), the Supreme Court reiterated its position by stating:

> [W]e held (in Monsanto) that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. . . . To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently (citations omitted).

The court went further to hold that if parties to an alleged conspiracy had "no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." 475 U.S. at 596-97, 106 S.Ct. at 1361, 89 L.Ed.2d at 558-59. As to permissible inferences, the court stated:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in Monsanto Co. v. Spray-Rite Service Corp., . . ., we held that conduct as consistent with permissible competition as with

> illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

475 U.S. at 588, 106 S.Ct. at 1356, 89 L.Ed.2d at 553. See also, Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 819 (11th Cir.), cert. denied, 495 U.S. 924, 110 S.Ct. 1960, 109 L.Ed.2d 322 (1990). ("[A] plaintiff must adduce evidence that tends to exclude the possibility that the alleged co-conspirators acted independently and in a manner consistent with rational business objectives.").

The Supreme Court followed the Monsanto and GTE Sylvania principles in the price cutting case of Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726, 108 S.Ct. 1515, 1520-21, 99 L.Ed.2d 808, 818 (1988), cert. denied, 486 U.S. 1005, 108 S.Ct. 1727, 100 L.Ed.2d 192 (1988), when it stated the following:

> "[T]here is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of GTE Sylvania."

Following the law, as set by the Supreme Court in the above Monsanto/ Matsushita rule, the Eleventh Circuit, in the price fixing case of Helicopter Support Systems v.

Hughes Helicopter, 818 F.2d 1530, 1532-34 (11th Cir.1987),[45] noted that the court had modified the general summary judgment standard for antitrust violations. The circuit discerned a two-step test which the antitrust plaintiff must survive in order to avoid summary judgment: 1) "[T]he plaintiff must satisfy the court that the conspiracy which he alleges is, objectively, an economically reasonable one;" 818 F.2d, at 1534; and 2) The plaintiff "must also be able to point to evidence which tends to exclude the possibility that the manufacturer was operating independently." Id. See also, Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1579 (11th Cir.1988) (The nonmoving party must come forward with specific facts to present evidence excluding the possibility of independent action.) (citing Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority, 801 F.2d 1286, 1291 (11th Cir.1986)). But see, In re Coordinated Pretrial Proceedings, 906 F.2d 432 (9th Cir.1990), cert. denied, 500 U.S. 959, 111 S.Ct. 2274, 114 L.Ed.2d 725 (1991) (Court found defendants' detailed price announcements were of no use except to communicate price changes to competitors).[46]

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45. This was a distributor-termination case.

46. This part of Petroleum Products has not found acceptance elsewhere. The facts in Petroleum Products are not on point with the facts in the instant case. Here price announcements were not made. Sealed bids were submitted as a part of the municipally-established procedures for awarding business — a legitimate business purpose. Even were Petroleum Products on point, the decision is inconsistent with the Eleventh Circuit Dunnivant decision which this court must follow.

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Dunnivant, 851 F.2d at 1583, specifically addressed the argument espoused by plaintiffs and advanced by Dr. Lanzillotti in the case at bar, "Conscious Parallelism," by stating:

> Dunnivant also attempts to link the appellee suppliers with the appellee retailers on a theory of conscious parallelism. He argues that each of the individual suppliers was aware of the retailers' conspiratorial objective, thereby constituting a violation of the Sherman Act. Proof of parallel behavior alone does not establish a prima facie case of a Sherman Act violation. In order to avoid a motion for summary judgment, a plaintiff must come forward with significant probative evidence supporting its theory of conscious parallelism with some "plus" factor which tends to indicate the absence of independent action. In addition, it must be shown that the decisions not to deal were contrary to the defendants' economic self-interest so as to raise an issue of good faith business judgment.

Thus, our circuit has held additionally that in order to survive a summary judgment motion, the antitrust plaintiff must prove a "plus" factor (something strongly suggesting the presence of a price-fixing agreement). See also, Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 826 (11th Cir.1990) ("The rule in this circuit is that evidence of conscious parallelism does not permit an inference of conspiracy unless the plaintiff establishes that each defendant engaging in the parallel action acted contrary to

its economic self-interest"). See E.I. DuPont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2nd Cir.1984) ("The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws"); J. Kattan, Beyond Facilitating Practices, 63 ANTITRUST L.J. 133, 145 (1994) (The Justice Department "appeared to concede that a public announcement that communicates information that is useful both to consumers and to rivals is beyond the reach of Section 1 of the Sherman Act").

Defendants' "plus factor" was reaping higher profits in an oligopolistic market. "When a business justification for the parallel conduct is apparent and no evidence is presented to support an alternative explanation, evidence of conscious parallelism is insufficient to prove a conspiracy." J. Kattan, Beyond Facilitating Practices, 63 ANTITRUST L.J. 133, 140 (1994). Defendants' financial records do not support plaintiffs' contention of "dramatically increased profits" on chlorine.

In arguing that Matsushita did not change the standard for summary judgment, plaintiffs have cited the holding in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992), in which the court held the photocopier manufacturer was not entitled to summary judgment, dismissing federal antitrust claims as to (1) tying arrangement between parts and service, and (2) monopolization of sale of service. Plaintiffs directed the court's attention to the following passage:

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> The Court's requirement in Matsushita that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enumerates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

504 U.S. at __, 112 S.Ct. at 2083, 119 L.Ed.2d at 285. The court finds no fault with plaintiffs' ensuing conclusory argument: "Thus, if a plaintiff's theory is supported by substantial evidence and is economically plausible, summary judgment must be denied." The cited passage and conclusion drawn are consistent with the holdings of the Supreme Court and our circuit. It is only when a plaintiff's theory is unsupported by substantial evidence and is economically implausible that summary judgment should be granted.

Following the principles of Monsanto/Matsushita and Dunnivant, Judge Propst granted an antitrust summary judgment in Gas Utilities Company of Alabama, Inc. v. Southern Natural Gas Co., 825 F.Supp. 1551 (N.D.Ala.1992), aff'd, 996 F.2d 282 (11th Cir.1993), cert.

denied, 510 U.S. 1042, 114 S.Ct. 687, 126 L.Ed.2d 654 (1994), with the following words:

> The principles set forth in Dunnivant v. Bi-State Auto parts, 851 F.2d 1575 (11th Cir.1988) govern plaintiff's "conscious parallelism" claim. The Dunnivant court held that a plaintiff must demonstrate that the decision not to deal was contrary to a defendant's economic business interest so as to raise an issue of good faith business judgment. Id. at 1583. In the instant case, defendant Southern has proffered sound business reasons . . . . Moreover, GUA [plaintiff] has offered nothing to refute Southern's justification (footnote omitted).

825 F.Supp. at 1573.

Furthermore, the mere fact that defendants use identical price lists does not show a price-fixing agreement. Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37 (7th Cir.1992). The Reserve Supply court quoted DuPont v. FTC, 729 F.2d 128, 139 (2d Cir.1984), when it said: "[T]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws." See also, Market Force, Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1172 (7th Cir.1990) ("[C]onscious parallelism by itself is not enough to support an antitrust conspiracy case."); Clamo-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478, 484 (1st Cir.1988), cert. denied, 488 U.S. 1007, 109 S.Ct. 789, 102

L.Ed.2d 780 (1989) (The use of identical price lists by competitors in a concentrated industry does not show a price-fixing agreement.)

Plaintiffs have argued defendants' use of discounted prices to meet prices of regional competitors was an indication of illegal agreements, pointing to the price differential between bids in peninsular Florida and bids in the rest of the United States. In doing so they ignored the compelling economic justifications for the differentials: 1) repackaged chlorine contracts in peninsular Florida are significantly larger than contracts in Alabama; 2) peninsular Florida has a significantly larger supply of repackaged chlorine than Alabama;[47] and 3) a significantly greater number of entities bid in Florida than Alabama.[48] A similar argument relating to price differentials was rejected in Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 52 (7th Cir.1992), when the court stated:

> [B]ecause of the interdependence of the market, one producer cannot maintain higher prices than another without risking a loss of market share. . . . Meeting the discounts of the new regional competitors does not suggest necessarily a conspiracy to maintain higher prices in other regions. These actions well could have been

47. Seven repackaging plants in Florida versus two in Alabama.

48. Allied Universal bids in Florida. It has repackaging plants in southeast Florida, central Florida and Brunswick, Georgia, which serves north Florida.

independent decisions of Owens-Corning and CertainTeed to cut prices in order to preserve market share.

VI. CRITIQUE LANZILLOTTI/McCLAVE ANALYSIS

A. Lanzillotti

The periodic occurrence of identical bids for some municipal chlorine contracts in Alabama during 1984 to 1990 constitutes the primary empirical cornerstone for the Lanzillotti/McClave opinions that defendants engaged in illegal collusive behavior. These bids must be viewed against the backdrop of relevant market conditions in the industry. The importance of market-specific circumstances in drawing inferences about conspiracy from observed bidding patterns is emphasized by Porter and Zona, who note:

> In general, finding a single test procedure to detect bid rigging is an impossible goal. As in most tests for the exercise of market power, the idea is to identify differences between the observable implications of collusive and competitive behavior. The difficulty is that both competitive and collusive equilibria depend, to great extent, on the economic environment.

R. Porter and J. Zona, Detection of Bid Rigging in Procurement Auctions, 101 J.POL.ECON. 518, at 519 (1993).

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Dr. Lanzillotti's opinion is based on the theory that the defendants participated in "Conscious Parallelism" — defined by the Supreme Court in the following manner:

> Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions (emphasis added).

Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, __, 113 S.Ct. 2578, 2591, 125 L.Ed.2d 168, 189 (1993). According to Lanzillotti conscious parallelism is a process by which defendants observe their competitors in the market place and take those observations into account in determining their own actions or responses. As part of the process they might bid on jobs they do not expect to win, as signals to their competitors that on the next bid or so they might raise their prices.

Lanzillotti relies almost entirely on a 1969 academic article written by then associate law professor, now a sitting federal judge on the Seventh Circuit Court of Appeals in Chicago, Honorable Richard A. Posner,[49] in which

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49. Judge Posner clerked for Justice William Brennan after graduation from Harvard Law School. From there he served on the

(Cont'd)

the author saw no difference between a conspiracy accomplished by tacit, subtle kinds of activities and a conspiracy accomplished by explicit activities. Posner, Oligopoly Price and the Antitrust Laws: A Suggested Approach, 21 STAN.L.REV. 1562 (1969). Posner's view, however, was not the law, only a suggested approach from which the law veered when it returned to the "rule of reason" during the last twenty-five years.[50] Even Posner recognized his concept of "tacit collusion" had not been accepted when he said:

> Suppose there is no agreement at all. In a market with three firms of equal market shares, one firm increases price and hopes that the others will understand that all three have a common interest in raising price. Or one firm, in a time of expanding demand, declines to add to capacity; the other two learn of this decision and do likewise. There are no dealings among the firms, but there is an understood mutual interest. Is this a combination in restraint of trade?

(Cont'd)
staff of FTC Commissioner Philip Elman, serving as an assistant to the Solicitor General. As a professor of law at the law schools of Stanford University and the University of Chicago, he helped pioneer the adoption by the courts of many concepts of the so-called "Chicago School." For the past decade he has served on the Seventh Circuit Court of Appeals in Chicago.

50. An explanation of the rule of reason appears in the court's discussion of the case law development of antitrust law beginning on page 35 of the opinion.

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> The answer given by most courts and scholars is no.

R. Posner & F. Easterbrook, Antitrust Cases, Economic Notes and Other Materials, 307 (2d ed. 1981).[51]

In the 1984 supplement to the Posner and Easterbrook text, the authors questioned the premise underlying the 1969 Posner article, pointing to new studies, pertinent portions of which follow:

> These new studies call into question the position — which underlies much of antitrust law, . . . that increasing concentration creates a significant rush of cartels (or cartel-like oligopolistic interdependence).
>
> . . . . .
>
> These studies, taken together, suggest that we must be very cautious of claims that concentrated markets are not competitive markets. Concentration predisposes to collusion, no doubt, but it may turn out as in DuPont v. FTC [729 F.2d 128 (2d Cir.1984)] that three or four substantial rivals are enough to preserve competition even under the "ideal" conditions for collusion.
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> . . . . .

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51. Posner was then a professor of law at the University of Chicago, leaning toward the conservative "Chicago School" of economics.

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> Three economists have questioned whether even inflexible delivered pricing is a symptom of a cartel. . . . Carlton points out that there is no reason why members of a cartel would gain from using identical delivered prices. . . . Carlton argues that a rational cartel would use f.o.b. pricing, so that each member "naturally" gets the business of the nearest customers, to which freight costs are least, and the member can detect cheating when the pattern of sales changes.

R. Posner & F. Easterbrook, Antitrust Cases, Economic Notes and Other Materials, 41-43 (2d ed. Supp.1984).

Posner and Easterbrook, in the section of the supplement entitled "Uncertainty and Antitrust,"[52] went on to say:

> Every market is balanced between competition and cooperation.
>
> . . . . .
>
> If cooperation is at once frequently beneficial and frequently ill-understood, it makes little sense to have a tradition of hostility [toward business practices which may involve some tacit cooperation among competitors]. We should not leap from ignorance to condemnation.

Id, at 44-45.

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52. Adapted from Frank H. Easterbrook, The Limits of Antitrust, 63 TEX.L.REV. 1 (1984).

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Judge Posner's view of "conscious parallelism" or "tacit collusion" has changed since he authored the 1969 article. In explaining the changes in his philosophy through the years, Judge Posner revealed he has replaced his former acceptance of the oligopoly theory of economics espoused by Joe Bains and Edward Chamberlain with new theories and new studies concerning market concentration. R. Posner, From Von's to Schwinn to the Chicago School: Interview with Judge Richard Posner, Seventh Circuit Court of Appeals, ANTITRUST, Spring 1992, at 4.

The Supreme Court and the Eleventh Circuit have set the standard for establishing an antitrust conspiracy. A plaintiff must have evidence that tends to exclude the possibility that the alleged conspirators acted independently. Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1580 (11th Cir.1988). In a case based on conscious parallelism (or parallel behavior), a plaintiff must have 1) significant probative evidence supporting the theory of conscious parallelism, 2) some "plus" factor that tends to indicate the absence of independent action, and 3) a showing that the defendants' behaviors were contrary to their own economic self-interest so as to raise an issue of good faith business judgment.

In relying on the Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) requirements (reliability and relevancy), defendants claim Dr. Lanzillotti's testimony is inadmissible for three reasons: 1) his testimony is inconsistent with antitrust law from the United States Supreme Court and the Eleventh Circuit and thus is irrelevant; 2) his subjective interpretation of normal business communications and

events as being conspiratorial is irrelevant and has no reliable basis in his discipline, economics; and 3) his subjective judgment that defendants conspired and that each defendant was a conspirator cannot be tested and thus had no reliable basis in economics.

Dr. Lanzillotti's opinions are incompatible with antitrust law in two areas: 1) his opinion that a unilateral decision by a supplier to do or not to do something could be conspiratorial; and 2) his opinion that conscious parallelism (or tacit collusion) is conspiratorial. Dr. Lanzillotti testified a unilateral decision, such as not attempting to increase market share, could be tacit collusion — a conspiracy violating the Sherman Act. He failed to grasp the concept that unilateral decisions are by definition independent actions and thus not antitrust violations. Dr. Lanzillotti's opinion that there was an antitrust conspiracy conflicts with opinions issued by the Supreme Court and the Eleventh Circuit.

To reach the conclusion that conscious parallelism is conspiratorial, Dr. Lanzillotti ignored the "plus" factors indicating independent action on the part of the defendants and the fact that participation in a conspiracy would have been contrary to their economic self-interests. As subjective beliefs, his interpretive opinions have not and cannot be tested, have not been subjected to peer publication, cannot have a known or potential rate of error, do not have general acceptance in economics, and have not been generally accepted.[53] Therefore, they are not reliable under Daubert.

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53. Daubert factors to be considered in a Fed.R.Evid. 104(a) inquiry.

His subjective interpretation of normal business communications and events as being conspiratorial is irrelevant and has no reliable basis in his discipline, economics.

Furthermore, Dr. Lanzillotti's expert testimony is contradictory. As an economic expert for the Florida Attorney General in the Florida "panhandle" case, he defined the collusive market as being composed of the southern portions of Alabama, Mississippi and Louisiana plus the Florida panhandle. Northern Alabama, Georgia, the Carolinas, Virginia, West Virginia, Tennessee and Kentucky were not included in his defined market area. Although Dr. Lanzillotti advised the Florida Attorney General that there was a conspiracy in the peninsula of Florida, he now says the peninsula area is conspiracy-free.

From his observation of the charts and data compiled by statistician McClave on Lanzillotti's selected market area, Dr. Lanzillotti noticed that the resale price of packaged chlorine rose faster than the increase in the chlorine repackagers' cost of raw chlorine — hinting at a suggestion of conspiracy. In reaching this conclusion, however, he not only failed to evaluate the defendants' total cost of conducting business, he stated during deposition testimony that "no matter how significant other costs were to raw costs" his opinion would not change.

Dr. Lanzillotti's observation based on incumbency data — the frequency with which incumbents won each year's new chlorine supply contract — is limited to chlorine

transactions of municipalities that solicit competitive bids.[54] It ignores sales to commercial and industrial businesses and sales to municipalities that negotiate prices. Out of the hundreds of municipalities, water boards, sewer boards, and other entities, only 10 to 15 use the publicly opened sealed bid for the purchase of chlorine. Dr. Lanzillotti's use of one point to represent the percentage of incumbent wins for each year actually depicts, at most, five to eight sealed bid situations on the South Alabama charts and about the same number on the North Alabama charts. A change of one bid out of five could result in a 20 percent swing in the percentages. Consequently, data based on so few transactions is statistically meaningless.

Although Dr. Lanzillotti assumed the incumbent was the low bidder and got the contract in each instance by some tacit collusion, he admitted municipalities often have preferences for certain suppliers and find ways to award contracts to them, as in the case of Albertville. Even so, there was no pattern of incumbents winning the bid of the Birmingham Water Works Board or Huntsville, two of the three largest purchasers of chlorine in the subject area. In situations in which Dr. Lanzillotti said systems flipped coins to decide tie bids, chance outcomes greatly affect incumbency rates when taken from limited data sources.

Incongruously Dr. Lanzillotti sees something sinister in what he terms "stable market shares" of the defendants.

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54. Dr. Lanzillotti proceeded on the erroneous assumption that "the publicly opened sealed bid . . . [was] the predominate sales mechanism used by public purchasers."

The figures, however, show anything but stable market shares. Rather than indicating collusion, the figures evidence absence of collusion, contradicting the existence of a conspiracy. Industrial's market showed wide increases and decreases — from virtually no market share in 1981 to 21 percent by 1985 and 42 percent by 1989. Jones' market share decreased every single year of the alleged conspiracy, declining from a 31 percent market share to a 16 percent market share. Harcros's market share plummeted from 41 percent to 25 percent between 1987 and 1988. PB & S's seven percent 1983 market share dropped off the bottom of the chart by 1986, with PB & S not even making it back onto the chart until 1992. Even so, Dr. Lanzillotti took the position that losing market shares every year could be indicative of a conspiracy.

The ups and downs of other companies indicated no pattern. Van Waters had less than one percent to zero market share in Alabama in 1984, 1985, 1986, and 1987. In the "North Alabama" submarket it won only the Gadsden bid in 1988, 1989, and 1990. Significantly, plaintiffs' statistician Dr. McClave conceded this series of bids did not indicate a collusive bid pattern. In the "South Alabama" submarket served by Van Waters' Mobile branch from 1982 through 1992, Van Waters never won a bid.[55] Participation

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55. The chlorine sold by Van Waters in the "South Alabama" submarket is trucked from Geismar, Louisiana, or Tampa, Florida. Consequently it has had a substantial cost disadvantage in relation to other chlorine suppliers who sell chlorine in the Mobile area. Van Waters' practice was always to bid list price, the same price charged to non-bid customers for chlorine, on contracts to supply municipal entities in South Alabama.

in a conspiracy in which it won virtually no bids and had a "zero market share" would have been economically irrational behavior for Van Waters. The same would have been true for PB & S which also had "zero market share."

Dr. McClave's market share charts for the North Alabama and South Alabama "submarkets" show drastic changes in market shares. Van Waters moved from a 65 percent market share of the North Alabama market in 1982 to zero in 1986. Harcros's share of the same market fluctuated from 29 percent in 1983, to 62 percent in 1984. Its 67 percent market share in 1987 was down to 24 percent in 1989. Industrial's share showed similar fluctuations: one percent in 1984; 33 percent in 1985; 34 percent in 1987; one percent in 1988; and back to 62 percent in 1989.

McClave's South Alabama chart shows unstable market shares as well. Harcros suffered continual decreases in market share over the time of the alleged conspiracy. Former defendant Mayo went from a zero percent of the market share in 1983 to 15 percent by 1985.

Although both Lanzillotti and McClave admit one would expect to find stable market shares if a conspiracy were in effect, they still opine defendants' fluctuating market shares evidence collusion. McClave states PB & S's zero percent market share over several years is a "stable number." With no supporting evidence, plaintiffs' experts conclude PB & S and Van Waters conspired to sell no chlorine in Alabama because they picked up chlorine sales in other areas. Lanzillotti and McClave both testified, however, there would have to be evidence of a makeup

market's being given in some other Southeastern state. There was no evidence of increased markets elsewhere. In fact McClave testified he had no evidence PB & S had been given a disproportionate increase in market share in other parts of the Southeastern states to counterbalance or compensate it for conspiring to put itself out of business in Alabama or to go from an 18 percent market share in 1983 to a zero market share. As manager of quality assurance at PB & S Mr. Richard Perry[56] was and is responsible for selling prices on compressed gases: chlorine; anhydrous ammonia; and sulphur dioxide. His undisputed testimony is as follows:

1) He never had bidding or price information, direct or indirect from competitors prior to bids.

2) PB & S never considered Alabama a significant market area for the retail sale of chlorine.

3) Municipal bid purchases of chlorine have been only a tiny portion of the PB & S business in North Alabama, which has consisted primarily of industrial accounts.

4) PB & S was never afforded any other territory to compensate for a diminished share of the Alabama market.

B. McClave

Dr. McClave's report summarized the results of statistical and econometric analyses performed under his

56. Mr. Perry has been employed by PB & S since 1975.

supervision in the State of Alabama and other Southeastern states by Info Tech, Inc., but he adopted Dr. Lanzillotti's definition of the relevant markets and submarkets rather than defining them himself. All of McClave's analyses focused "on the sale of repackaged liquid chlorine to public entities in the Southeastern market, and most of [his] analyses focus[ed] on the geographic sub-marketing of Alabama and Florida panhandle municipalities that let bids on an annual basis."[57] McClave Report, p. 3.

McClave's methodology to determine the existence of a conspiracy is his subjective judgment. His subjective judgments, however, cannot be tested. His opinions about whether high losing bids are signals is based on looking at the data using his "experience" and "judgment." He admits there is no statistical test to determine that a high losing bid is a signal. His statistical analysis is not impressive. Having testified, McClave has not made a case under Fed.R.Evid. 104. His statistics show anything but a successful conspiracy.

Although Dr. McClave testified he knew of "no way to put measures of error on anybody's judgment" other than by looking "at the rate of error associated with similar judgements in the past," Mr. Justice Blackmun in speaking for the Supreme Court stated:

> Ordinarily, a key question to be answered in determining whether a theory or technique is

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57. The municipalities of the Florida panhandle are not parties to this suit. The suit alleges a conspiracy in the state of Alabama — not Alabama, the Florida panhandle, and the Southeastern states.

> scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green, at 645. See also C. Hempel, Philosophy of Natural Science 49 (1966) ("[T]he statements constituting a scientific explanation must be capable of empirical test"); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability").

Daubert, 509 U.S. at __-__, 113 S.Ct. at 1796-1797, 125 L.Ed.2d at 482-483.

Additionally, Dr. McClave's mistaken belief that conscious parallelism is a conspiratorial agreement is inconsistent with antitrust law as declared by the Supreme Court and the Eleventh Circuit. He apparently does not understand that the law requires excluding the possibility of independent action by the alleged conspirators before even considering other elements of a conspiracy.

Dr. McClave created new data from the sparse data furnished him: tie bids, incumbency and "market"[58] shares

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58. Dr. McClave calls his statistics "market" shares, but admits that his numbers only include that portion of the market in which the plaintiffs buy chlorine by sealed bids.

— all three correlated. He determined there was a tendency for tie bids to be awarded to the incumbent company; conceded that if there were some explanation other than collusion for the incumbents winning tie bids that the explanation would reach to their winning and to the market shares; and determined that tie bids, incumbents winning and market shares are not independent events.

Even so, Dr. McClave admits that tie bids will be seen in competitive markets. His tie bid analysis includes bids by nondefendants who tied with defendants. Such evidence does not support an inference that defendants conspired, but others did not. He opined that tie bids between Industrial and Jones, and Industrial and PB & S, were indicative of explicit agreements because of their distributor/supplier relationships.

Of the seventeen different companies that bid for chlorine contracts in Alabama during the alleged conspiracy, five bids were won by companies not identified by McClave as conspirators. Failure to consider this dilutes his analysis.

Rather than being evidence of a conspiracy, the evidence of tie bids in this case should be viewed as a strong indication of the absence of a conspiracy.

Dr. McClave argues defendants are earning supracompetitive prices. The graphs of C.P.A. Garner[59] show Industrial's gross profits went up as the alleged

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59. Mr. Garner's analysis appears to have been ignored by Dr. Lanzillotti.

conspiracy ended. For ton containers, Industrial's gross profits ranged between 17 and 19 percent for 1985, 1986, 1987, and 1989, and increased to 28 percent in 1990. By 1991 gross profits per ton of chlorine had increased to 43 percent. Gross profits for 150 pound containers ranged between 38 and 47 percent for 1985, 1986, 1987, 1988 and 1989. Profits increased to 56 percent in 1990 and were up to 63 percent in 1991.

C. Kasserman

Dr. David L. Kasserman,[60] expert for Harcros, PB & S and Van Waters, flaws the Lanzillotti/McClave analysis for failure to consider expected raw cost increases and opportunity costs. He analyzed the same structural conditions that Dr. Lanzillotti analyzed and other structural conditions Dr. Lanzillotti ignored (those that contradict the existence of a bid-rigging conspiracy in the Alabama repackaged chlorine market). Dr. Kasserman also examined the pricing and bidding patterns that Dr. McClave believes are consistent only with conspiracy. He provides lawful, noncollusive explanations for them. Upon completion of his analysis, Dr. Kasserman has opined bid rigging did not

60. B.S., economics, the University of Tennessee. Ph.D., economics, The University of Florida. Torchmark Professor of Economics, Auburn University, 1988-present. Dr. Kasserman taught economics at the University of Tennessee, the University of Florida, and Auburn University prior to moving into his present position from that of professor and Head of Economics at Auburn University. He has published extensively in his field and has presented papers at numerous professional meetings. He has testified before state and federal agencies and in judicial settings.

occur in the Alabama repackaged chlorine market as alleged by the plaintiffs. In the case of Van Waters, failure to consider raw cost increases and opportunity costs, coupled with transportation costs, results in a major flaw. Van Waters' chlorine bids, particularly from its Mobile branch, were at, near, and sometimes below cost. Even Dr. McClave acknowledged Van Waters' representative bids of the Mobile branch were not noncompetitive.

Dr. Lanzillotti failed to consider the role of supply and demand in pricing. He did admit that during the decade of the 80's the chlorine market moved from one with oversupply of chlorine with low demand to one with increased demand. The period of increased demand coincided with the proportionately greater increase in the price of repackaged chlorine. Dr. Lanzillotti, nevertheless, found the combination of increased price and increased demand to be suggestive of "tacit collusion." He further failed to figure built-in margins to cover anticipated future cost increases, but acknowledged that a hedge of some type might be something one would want to do.[61]

In reaching the conclusion that a conspiracy occurred, Dr. Lanzillotti ignored barriers to entry in the market — a widely recognized determinant in collusive agreements. Where barriers to entry are low, an increasing price caused by the formation of a successful collusive agreement among producers will attract new firms in the market. With the

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61. Repackagers purchase raw chlorine at fluctuating, non-firm prices and sell it at firm prices generally guaranteed for a year.

addition of new suppliers the price will be pushed back down. Thus, according to Dr. Kasserman, collusion is unlikely to occur in markets where barriers to entry are low and particularly where low barriers are combined with inelastic demand.[62]

Dr. Kasserman determined the repackaged chlorine industry is characterized by very low entry barriers. There are no prohibitive patents or secret production technologies to prevent new companies from producing repackaged chlorine — a relatively simple manufacturing process. There are no problems with access to raw materials. There are no pronounced economies of scale that require a large-scale operation to be cost competitive. There is no significant product differentiation to be overcome by new entrants. Consequently, had there been a conspiracy in the market, new entry into the repackaged chlorine market would have been expected. Such was not the case. The number of chlorine repackagers in Alabama and Tennessee did not change during the period of 1984 through 1990. The states of Georgia, Florida, South Carolina, and North Carolina each lost a repackager, resulting in a net loss of four repackagers in the Southeastern repackaged chlorine market.

Dr. Lanzillotti further ignored the organizational structure of the firms involved in the alleged conspiracy. Dr. Kasserman considered this factor of utmost importance. Plaintiffs have failed to provide any personal incentive for any of the people involved to risk the consequences of participating in a conspiracy. Absent personal incentives plaintiffs have failed to give any plausible reason why

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62. A decrease in price will not lead to a comparable increase in consumption.

defendant employees would participate in a bid rigging conspiracy, risking imprisonment and imposition of millions of dollars of liability on their employers.

Dr. Lanzillotti's statement that central pricing control of chemicals other than chlorine did not exist is contradicted by record evidence regarding Van Waters. Mr. Simpson testified that an "edict issued by the president" of McKesson required all regional managers to approve all below-schedule (below list) pricing on all products in their regions from 1984 through 1987 or 1988. Mr. Ezell testified he never consulted Mr. Simpson regarding bid prices for bids submitted by the Mobile McKesson/Van Waters branch.

D. Blair

Dr. Roger Blair[63] was offered as the expert witness for Jones. His report is expressly limited to a critique of the reports of Drs. Lanzillotti and McClave.[64] Based upon

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63. Dr. Blair was engaged by Jones to provide an analysis of the expert reports submitted by Dr. Robert F. Lanzillotti and Dr. James T. McClave. Dr. Blair opined they had examined ambiguous evidence. In his view the evidence they cite is "equally consistent with oligopolistic rivalry and a complete absence of collusion."

Drs. Blair and Kasserman have written a book together entitled Antitrust Economics.

64. Dr. Blair has co-authored two articles with Dr. McClave. He does not challenge Dr. McClave's qualifications as a statistician, nor does he challenge Dr. Lanzillotti's qualifications as an economist. He does, however, disagree with their conclusions in the case at bar.

current, accepted economic doctrine, Dr. Blair opined that the market conditions and bidding patterns upon which Drs. Lanzillotti and McClave based their opinions are ambiguous and insufficient to prove an illegal agreement under Section 1 of the Sherman Act.

E. Under Daubert

In determining whether the theory used by Drs. McClave and Lanzillotti has been tested,[65] the court has noted that neither expert has identified conspirators or the existence of a conspiracy in court on direct examination. Dr. Lanzillotti is unable to remember whether he has been permitted to testify as to the identity of conspirators in a conspiracy to fix prices and allocate markets. Dr. McClave, however, has identified conspirators and the existence of a conspiracy on redirect examination in one antitrust case after a defense lawyer opened the door.

Since it is impossible to test the reliability of Drs. McClave and Lanzillotti by the above standard of their conclusions having been tested, the court has moved to the second standard: subjection to peer review and publication. When questioned on the acceptance by the scientific community of the process by which he determined the collusive markets and participants therein, Dr. Lanzillotti referred to the 1969 article by Judge Posner,[66] previously

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65. The first Daubert factor. See pages 1512-1513.

66. Posner, Oligopoly and the Antitrust Laws: A Suggested Approach, 21 STAN.L.REV. 1562 (1969).

mentioned, as support for his analysis in the case at bar. As previously noted, Judge Posner's advocacy of tacit collusion in the article was a suggested approach, not the law, and a position he later rejected.

Dr. McClave cited a publication by Dr. Kasserman in which Kasserman mentioned Dr. McClave's work in another case using the same methodology as used in the instant case as a validation of his method. The Kasserman reference, however, dealt with methodology of estimating damages, not identifying conspirators in a collusive market.

As a factor in determining reliability the Supreme Court spoke of publication in the following manner:

> The fact of publication (or lack thereof) in a peer-reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

Daubert, 509 U.S. at __, 113 S.Ct. at 2797, 125 L.Ed.2d at 483.

Dr. McClave testified he knew of no way to measure the rate of error[67] on possibility or potential for error on anyone's judgment other than by looking at the rate of error associated with similar judgments in the past. He did not know how his methodology had been used by others. Similarly, Dr. Lanzillotti was unable to give a formula for the rate of error.

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67. Third Daubert factor.

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The methodology used by Drs. McClave and Lanzillotti failed the fourth Daubert factor, as well. There is no acceptance of their methodology in the relevant scientific community. The rejection of Posner's conscious parallelism, however, is widespread.

VII. McCLAVE TESTIMONY STRICKEN

Having testified, McClave has not made a case under Rule 104. His testimony is stricken because it is not reliable. His statistical analysis is not impressive. McClave's statistics show anything but a successful conspiracy. Under Fed.R.Evid. 104 his testimony is rejected as expert testimony.

VIII. GARNER TESTIMONY STRICKEN

The "expert" testimony of Mr. Perry Garner, C.P.A., is also inadmissible. He is no more qualified than Dr. McClave to testify on opinions based on economic theory. His deposition testimony regarding Van Waters' actual profit margins shows only that he did not consider a number of important cost factors. Significantly, exhibits produced by Mr. Garner have all been produced since his deposition at which time he expressed no opinions concerning the possibility of the existence of or the members of any antitrust conspiracy.

IX. SUMMARY JUDGMENT — CONSPIRACY COUNT

This court, following the law as set by the Supreme Court and our circuit in Helicopter, 818 F.2d 1530 (11th Cir.1987), and Dunnivant, 851 F.2d 1575 (11th Cir.1988),

holds that the defendants are entitled to summary judgment as a matter of law. Plaintiffs have failed to satisfy the court the alleged conspiracy was economically reasonable and have failed to present evidence excluding the possibility of independent action on the part of defendants. Not only is the above necessary evidence lacking, the Supreme Court has recognized that a conspiracy cannot work if one significant competitor does not participate. Brooke Group, 509 U.S. at __, 113 S.Ct. at 2569, 125 L.Ed.2d at 196-97 (quoting 2 Areeda and Turner ¶ 404b2, at 276). Dr. Lanzillotti opined that Allied, a repackager operating out of Brunswick, Georgia, was a competitor, but not a conspirator. In his opinion Mayo,[68] a repackager operating out of Chattanooga, Tennessee, was at times a conspirator and at times not. Lanzillotti does not know if Apperson, a chlorine reseller like Industrial, was a conspirator. Of note is the fact that in some years Apperson's share of sales to plaintiffs in Southern Alabama was higher than Industrial's and was twice as high as Industrial's sales in 1987.

A. Industrial

Industrial has shown the court it had no motive to conspire to control the chlorine market. Data furnished to plaintiffs relative to its chlorine sales was not provided in turn to plaintiffs' experts. A comparison of prices charged other customers shows Industrial was not a member of a conspiracy. Dr. Arthur A. Thompson, Jr.[69] analyzed

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68. Dismissed as a defendant.

69. Dr. Thompson is an Emeritus Professor of the College of Commerce and Business Administration of the University of (Cont'd)

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Industrial's sales in four categories of customers: (1) Plaintiffs that bid; (2) Plaintiffs that did not bid; (3) Other government entities; and (4) Nongovernment entities. From his analysis he drew the following conclusion:

> The fact that Industrial Chemicals charged the plaintiffs consistently lower prices for chlorine bought in either 150-lb. cylinders or in tons is powerful evidence that the analysis and opinions of plaintiffs' experts are badly flawed and erroneous. It makes no sense for Industrial Chemicals to have conspired with other chlorine sellers, as alleged by plaintiffs' experts, to rig their bids in a manner which resulted in lower prices being charged to the plaintiffs than other customers. The purpose of a conspiracy is to charge a higher price, not a lower price. The opinions of plaintiffs' experts that the pricing patterns they observed represent bid rigging are simply not credible insofar as Industrial Chemicals is concerned.

(Cont'd)

Alabama where he taught economics and business administration from 1967 until retirement. He has authored economics and business administration textbooks and has served as a consultant in related fields. He earned a Ph.D. in economics from the University of Tennessee and has since studied at the Harvard Business School as a visiting scholar and as a participant in its individual studies program.

Dr. Thompson reviewed the reports prepared by Dr. Lanzillotti and Dr. McClave on behalf of the plaintiffs and by Dr. Blair, Dr. Kasserman and Mr. Clinton on behalf of the other defendants.

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> I also examined what proportions of Industrial Chemicals' total sales were represented by chlorine sales (all customers) and chlorine sales to plaintiffs.
>
> . . . . .
>
> These statistics indicate that Industrial Chemicals' total sales of chlorine to all customers amount to only 4-5% of its total business. Industrial Chemicals' sales of chlorine to the plaintiffs amount to only 1% of total sales and to only about 20% of total chlorine sales. Given that chlorine sales to the plaintiffs are such a tiny part of Industrial Chemicals' total business, it is hard to see any good business reason or motivation to engage in conspiratorial behavior. Plaintiffs' experts have apparently overlooked this in their attempt to link Industrial Chemicals to their alleged conspiracy theory.

Preliminary Report of Arthur A. Thompson in Alabama Chlorine Antitrust Litigation, July 1994, pp. 8-9 (emphasis added). See also VI P. Areeda Antitrust Law, ¶ 1429, at 175-178 (1986) (The economic theory present in an oligopoly states that each firm, without agreement, will seek to maintain its market share at the highest possible price).

Plaintiffs' assertion that if the market were truly competitive individual defendants would cut prices in order to increase market share is not consistent with economic theory. In an oligopoly each seller's price affects the market

price to be expected on the next sale. The incentive to reduce prices is restricted because any price cut would immediately become public knowledge on the bid opening, resulting in the lowering of prices by other firms on following bids in an effort to maintain their share of the market. See generally, VI P. Areeda Antitrust Law, ¶ 1429c., at 177-178 (1986); Turner,[70] The Definition of Agreement Under the Sherman Act: "Conscious Parallelism and Refusals to Deal," 75 HARV.L.REV. 655, 659 (1962) ("[T]he fact that competitors have knowingly charged identical prices is a neutral fact in the absence of evidence which would lead one to expect that the prices would have been different if truly independent decisions had been made.")[71] Even Dr. McClave admits the economic data he compiled cannot exclude the possibility of independent decisions by defendants.

Additionally, Dr. Lanzillotti's data pertaining to Industrial is inaccurate. It does not include data on the rest of Industrial's more than 300 yearly chlorine customers. The data and Lanzillotti's accompanying analysis are limited to the one to two percent of Industrial's customers that solicited sealed bids. Because all of Industrial's customers are not considered, experts' opinions relating to its part in a conspiracy are unreliable. In Brooke Group, 509 U.S. at __, 113 S.Ct. at 2598, 125 L.Ed.2d at 198, the Court stated:

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70. Donald F. Turner, Professor of Law, Harvard Law School. A.B., Northwestern, 1941; Ph.D. Harvard 1947; L.L.B., Yale, 1950.

71. Significantly, this is one of the few areas in antitrust theory in which the Harvard and Chicago schools of thought agree.

> When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury verdict. . . . Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them. As we observed in Matsushita, "expert opinion evidence . . . has little probative value in comparison with the economic factors" that may dictate a particular conclusion.

Plaintiffs contend defendants conspired by bidding at list price on sealed bids. Although Dr. Lanzillotti contends nonbid customers paid list price, as well, the evidence indicates chlorine prices charged to Industrial's customers varied greatly. The fact that parallel bids have occurred in the context of sealed bids does not change the analysis. Bid openings occur weekly from the hundreds of sealed chlorine bids in the Southeastern United States let each year. The bid results, announced at the openings, and bid tabulations setting out the bids of all vendors are usually mailed to all bidders. Thus, the current bids of all bidders are readily available public information published by the municipal entities.

Accordingly, identical bid results are not evidence of a conspiracy:

> Especially where the bids ultimately become public,[72] such parallelism need not show

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72. Even if the bids remain secret, losing firms will suspect that the successful firm under-bid the usual market price and react accordingly.

> anything more than a reluctance among the rivals to cut market prices that will be readily matched on the next transaction, which will occur immediately. In such circumstances, the parallelism of closed bids is nothing more than the parallelism of market prices. Interdependence may well be present, as in all oligopoly pricing, . . . but no traditional conspiracy may be inferred (footnote omitted).

VI P. Areeda Antitrust Law, ¶ 1420a., at 119 (1986).

From calculations of Industrial's total chlorine sales to all customers and the proportion of sales made to plaintiffs, Dr. Thompson reached the following conclusion, recited by deposition testimony:

> These statistics indicate that Industrial Chemicals' total sales of chlorine to all customers amount to only 4-7% of its total business. Industrial Chemicals' sales of chlorine to the plaintiffs amount to only about 1% of total sales and to only about 20% of total chlorine sales. Given that chlorine sales to the plaintiffs are such a tiny part of Industrial Chemicals' total business, it is hard to see any good business reason or motivation to engage in conspiratorial behavior. Plaintiffs' experts have apparently overlooked this in their attempt to link Industrial Chemicals to their alleged conspiracy theory.

Dr. Thompson found that the mean price Industrial charged for both 150-pound cylinders and tons of chlorine

was consistently below the prices Industrial charged other governmental and nongovernmental entities throughout the time period studied. The mean prices charged on plaintiffs' purchases involving competitive bids were consistently lower than the mean prices charged for the other three buyer classifications (purchases by nongovernment entities, purchases by governmental entities other than plaintiffs, purchases by plaintiffs believed to have been made on the basis of price quotes rather than bids). "The plaintiffs' data base contains only a small sample of the prices Industrial Chemicals charged its chlorine customers. Plaintiffs' attempts to draw conclusions about Industrial Chemicals' pricing using such a limited number of price observations are unreliable and incapable of yielding trustworthy conclusions." The fact that Industrial Chemicals charged the plaintiffs consistently lower prices for chlorine bought in either 150-lb. cylinders or in tons is powerful evidence that the analysis and opinions of plaintiffs' experts are badly flawed and erroneous.

The court holds that Industrial is due summary judgment for the following reasons:

1) Industrial's chlorine sales data shows that Industrial did not participate in the alleged conspiracy as set out by Dr. Lanzillotti;

2) Industrial chlorine sales data shows that it is implausible that Industrial participated in any conspiracy;

3) Dr. Lanzillotti's opinion of Industrial's participation in an antitrust conspiracy based on only two pieces of economic data is implausible; and

4) Plaintiff's other evidence against Industrial is both inadmissible and ambiguous.

B. Jones and Van Waters

Jones joined in Industrial's motion for summary judgment, adopting and incorporating all material submitted by Industrial. Van Waters adopted the motions for summary judgment and briefs submitted by Industrial and Jones. The court holds that Jones and Van Waters are due summary judgment as a matter of law. Industrial and Van Waters are clearly out. The others do not have that much economic power to make a conspiracy stick.

The court has not felt it necessary to address Jones's motion in the alternative for partial summary judgment based on the Sherman Act's four year statute of limitations.

C. PB & S

Not only is there no supporting evidence that PB & S was part of a conspiracy to fix prices, PB & S produced evidence that it was a nonplayer in the "South Alabama" submarket, as defined by plaintiffs, and had only a handful of sales in the North Alabama market. PB & S had no business in South Alabama and the Florida Panhandle area, and won only three bids in North Alabama from 1984-1990. It had a nonexistent market share from 1985 to 1990, the period of the purported conspiracy. PB & S was not a player in sales to municipalities. Plaintiffs have produced no evidence that PB & S was motivated to, participated in, or benefited from a conspiracy.

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It is more economically plausible to accuse other nonparties to this case of being conspirators than to accuse PB & S. Mayo Chemical's share of the North Alabama market went from 8.42 percent in 1986 to 31.51 percent in 1988. It is more economically plausible that Apperson Chemical Company was a conspirator than PB & S. It had a large market share in the Alabama and Florida Panhandle during parts of the conspiratorial period. PB & S had none. Van Waters had none. PB & S never sold chlorine in the Florida Panhandle area, only in the Florida Peninsula where plaintiffs' experts concluded there was no conspiracy.

Plaintiffs have failed to carry their burden of proof that PB & S was engaged in a conspiracy. Additionally they have failed to carry their burden of proof that PB & S engaged in price fixing. The affidavit of Richard Perry, manager of quality assurance at PB & S, is undisputed.

Plaintiffs have cited a memorandum from Mr. Perry to his Orlando, Florida, manager concerning pricing as "signaling" to raise market prices in the Florida Peninsula. Orlando, however, is in the Florida Peninsula market area, an area in which plaintiffs' experts have testified, in this case, there was no conspiracy to fix prices. This memorandum proves nothing.

While it is true PB & S sold chlorine to its distributor Industrial in the North Alabama[73] territory, there is no evidence PB & S had control over Industrial's resale price. According to Mr. Perry PB & S was unaware of the prices Industrial charged for chlorine.

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73. Jones sold chlorine to Industrial in South Alabama.

For the above cited reasons PB & S's motion for summary judgment is granted.

D. Harcros

As the only remaining defendant, Harcros would have been unable to conspire by itself. For that reason, plus the fact that plaintiffs have failed to prove Harcros was part of a conspiracy, the court holds Harcros is due summary judgment as a matter of law.

X. SUMMARY JUDGMENT — FRAUD COUNT

Even were there a conspiracy, plaintiffs have established no basis for the claimed common law fraud count. They allege defendants took the following actions: 1) a series of fraudulent increase letters to chlorine customers; 2) the submission of fraudulent noncollusion affidavits with sealed bids; 3) the destruction of documents by Jones; and 4) the defendants' vehement denials of price fixing in the Florida case.

Plaintiffs argue the defendants perpetrated fraud on plaintiffs by wording of announced price increases. Examples of notification of prices increases follow:

> WE ALWAYS REGRET ANY INCREASED COST TO OUR CUSTOMERS AND WE WISH TO ASSURE YOU THE ABOVE CHANGES HAVE BEEN THE RESULT OF INCREASES IN THE BASIC COST OF THE PRODUCT OR FREIGHT AND HANDLING CHARGES.

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August 11, 1986, notification letter from Cheri McKechnie, PB & S Sales Representative of price increase effective September 1, 1986. Exact wording reappeared in September 9, 1987, PB & S notification letter of price increase effective October 1, 1987, signed by Ms. McKechnie.

> Be assured there will not be an increase to you, unless we have an increase from our supplier.

May 24, 1990, communication from Naomi Hartman, PB & S Customer Sales & Service Representative to Mr. Roy Alford of The Town of Centre.

> An unprecedented situation has developed in the past twelve months in the Chlor-Alkali industry. We have had four increases in Chlorine Cost.
>
> We have absorbed part of these previous increases, but with this newer increase, we must drastically increase our prices on Chlorine in order to maintain our standards of service and safety.

April 28, 1984, Harcros form letter addressed to "Dear Valued Chlorine Customer."

> As you are probably already aware, an unprecedented situation has developed in the Chlor-Alkali industry in recent months. Our cost of chlorine has advanced several times but the most recent price increase effective April 1, 1984, which we have absorbed, makes the

following price revision necessary to maintain our standards of service to our loyal customers.

Chlorine is still in a relatively tight supply situation and we anticipate that it will remain so throughout 1984. We want to assure you that Thompson-Hayward Chemical Company will continue to make every effort possible to stabilize prices and protect the needs of our valued chlorine customers.

May 2, 1984, Harcros form letter.

Due to an increase from our manufacturers, we regret, we find it necessary to revise our selling price on Ton Cylinders of Chlorine. This increase will become effective November 1, 1987.

October 28, 1987, Harcros letter from Ted J. McGowan, Industrial Sales Representative, addressed "To our customers."

During the past several months, the Chlorine market has incurred several price increases. We have not passed any of the increases on to our long supportive customers, but unfortunately, we are no longer able to continue.

December 8, 1987, Harcros form letter signed by Tom Howard, Chemical Sales Representative.

Although it in no way reflects the wishes of Jones Chemicals, we find it necessary to adjust our

> selling prices from time to time in order to keep up with the ever increasing cost of staying in business as a reliable source of chemicals.

September 21, 1987, "Price Change Notice" from John D. Skipper, Sales Representative, Jones Chemicals, Inc.

> This price increase is the result of manufacturers increases, operating expenses, insurance costs, and environmental expenses.

April 16, 1985, letter from Robert M. Romeis, Vice President Jones, addressed to "Dear Chlorine Customer."

> Due to increased costs of handling and because of the hazardous nature of the material, the Chlorine prices have increased to all our customers.

May 13, 1986, Van Waters letter addressed "TO WHOM IT MAY CONCERN."

> Due to an increase from our Suppliers on chlorine, your new price will be as follows:

May 15, 1985, Van Waters letter addressed to "Dear Valued Customer." Significantly, however, plaintiffs have not shown Van Waters sent announcements of price increases to any Alabama customer or to any plaintiff. The only two cited Van Waters documents were sent by the Chamblee, Georgia branch to customers in Georgia. Dr. McClave acknowledged that the letters to the Georgia customers

truthfully announced prospective raw chlorine price increases in July 1985 and April 1986.

> As a result of increases announced by our suppliers, we will increase our price on chlorine effective July 1, 1986. These increases are a result of several things, some of which are actual chlorine cost, container cost, insurance coverage, and governmental compliance. We regret to have to advise you of this at this time, but we have no alternative.

June 15, 1986 letter from W.L. Welch of Industrial to customers.

Plaintiffs argue that the necessity for price increases as outlined above was designed to and did deceive the plaintiffs into believing that the price increases were the result of coincident cost increases. They argue they were the victims of the price fixing conspiracy. In actuality, resulting prices were the consequence of market forces and competition. Dr. McClave acknowledged that the costs of raw chlorine skyrocketed 363 per cent from $63.40 per ton in April 1983 to $230.02 per ton in September 1984. The cost of raw chlorine remained over 300 per cent of the April 1983 cost through 1988. Additionally, from the standpoint of economics, entry barriers were not high.

Having ruled there is no conspiracy, the court finds there can be no fraud for failure to disclose it. The defendants are not obligated to disclose what does not exist. Even were the defendants guilty of conspiracy, they had no

confidential relationship with the plaintiffs requiring disclosure of the existence of a conspiracy. In Lowder Realty, Inc. v. Odom, 495 So.2d 23, 26 (Ala.1986), brought under Code 1975, § 6-5-102, the court found no relationship between the plaintiff and defendant sufficient to warrant disclosure when it stated:

> No duty arises from the relationship of the parties here. Lowder and Odom were two independent business enterprises negotiating a business transaction at arm's length. Each party was astute in business matters and was equally capable of protecting its respective interests.

Similarly, in the case at bar the parties negotiated arm's length transactions. See also, Holdbrooks v. Central Bank of Alabama, N.A., 435 So.2d 1250, 1252 (Ala.1983) (quoting 15A C.J.S. Confidential (1967), which defined a confidential relationship in the following manner:

> "[A relationship in which] one person occupies toward another such a position of adviser or counselor as reasonably to inspire confidence that he will act in good faith for the other's interests, or when one person has gained the confidence of another and purports to act or advise with the other's interest in mind; where trust and confidence are reposed by one person in another who, as a result, gains an influence or superiority over the other; and it appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side,

> there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible. It arises in cases in which confidence is reposed and accepted, or influence acquired, and in all the variety of relations in which dominion may be exercised by one person over another."

The Holdbrooks court followed the holding in Tonsmeire v. Tonsmeire, 285 Ala. 454, 233 So.2d 465, 468 (1970),[74] by stating: "In the absence of a confidential relationship, we know of no duty imposed by law obligating an alleged tort feasor to make known to one possibly injured by his acts the existence of a possible cause of action."

During the alleged conspiracy period (1984 to 1990), only 17 of the 39 plaintiffs received bids for chlorine: Mobile, Tuscaloosa, Montgomery, Birmingham, Centre, Dothan, Gulf Shores, Huntsville, Jefferson County, Alexander City, Auburn, Gadsden, Muscle Shoals, Opelika, Sheffield, Talladega and Alberville. Van Waters did not submit a single bid to six: Auburn, Centre, Jefferson County, Muscle Shoals, Opelika, and Sheffield. Accordingly, it made no representations to those six.

Of the 22 plaintiffs that purchased chlorine on purchase orders, Van Waters sold chlorine to only two: Fairhope and Greenville. There is no evidence that Van Waters made any representations to Arab, Baker Hill, Calhoun County,

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74. The court held in Tonsmeire that there was no confidential relationship between antagonistic parties.

Central Elmore, Dallas County, Geneva, Hayneville, Northeast Morgan County, Jasper, Leeds, Phenix City, Perdido Bay, Prichard, Saraland, Scottsboro, Selma, South Alabama Utilities, Tri-Community, Vernon or Westover. Van Waters is entitled, in any event, to summary judgment on the fraud claims of 26 of the 39 plaintiffs.

Plaintiffs' averments of fraud have not been stated with particularity, as required by Ala.R.Civ.P. 9, nor have they presented substantial evidence of fraud as required by case law. There is no evidence that defendants actively and/or fraudulently concealed any alleged conspiracy. Accordingly, defendants are due summary judgment as a matter of law on the claim for fraud.

XI. CONCLUSION

The court has found no evidence of a conspiracy among the defendants to restrain trade in the chlorine industry. The court has not found evidence of fraud. In summary, the court holds the following:

1) Industrial is due summary judgment as a matter of law;

2) Jones is due summary judgment as a matter of law;

3) Van Waters is due summary judgment as a matter of law;

4) PB & S is due summary judgment as a matter of law;

5) Harcros is due summary judgment as a matter of law;

6) The testimony of Dr. James T. McClave is stricken;

7) The testimony of Perry Garner is inadmissible;

8) The testimony of Loraine and Peter Casassa is inadmissible;

9) The affidavit of Woody Caine is stricken;

10) The hearsay margin notation about Woody Caine is stricken; and

11) The affidavit of Barbara Krysti is stricken.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED.

APPENDIX C — FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION GRANTING SUMMARY JUDGMENT DATED AND ENTERED FEBRUARY 22, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION

NO. 92-G-1614-S

CITY OF TUSCALOOSA; MUNICIPAL UTILITIES BOARD OF ALBERTVILLE; THE WATER WORKS AND SEWER BOARD OF THE CITY OF BIRMINGHAM; WATER WORKS & SEWER BOARD OF THE CITY OF CENTRE; THE CITY OF DOTHAN, a municipal corporation; THE WATER WORKS AND SEWER BOARD OF THE CITY OF GADSDEN; THE UTILITIES BOARD OF THE CITY OF GULF SHORES; THE CITY OF HUNTSVILLE WATER WORKS UTILITY BOARD; THE WATER WORKS BOARD OF THE CITY OF LEEDS; THE BOARD OF WATER AND SEWER COMMISSIONERS OF THE CITY OF MOBILE; THE BOARD OF WATER & SEWER COMMISSIONERS OF THE CITY OF SARALAND; CITY OF SHEFFIELD; CITY OF VERNON WATER AND SEWER BOARD; CITY OF PHENIX CITY; THE CITY OF ALEXANDER CITY; THE WATER WORKS BOARD OF THE CITY OF ARAB; BAKER HILL WATER AUTHORITY; CALHOUN COUNTY WATER AND FIRE PROTECTION AUTHORITY; DALLAS COUNTY

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WATER AND SEWER AUTHORITY; CENTRAL ELMORE WATER AUTHORITY; CITY OF FAIRHOPE; GENEVA WATER WORKS AND SEWER BOARD; THE WATER WORKS AND SEWER BOARD OF THE CITY OF GREENVILLE; TOWN OF HAYNEVILLE; JEFFERSON COUNTY, ALABAMA; THE UTILITIES BOARD OF THE CITY OF MUSCLE SHOALS; NORTH EAST MORGAN COUNTY WATER AND FIRE PROTECTION AUTHORITY; PERDIDO BAY WATER, SEWER, AND FIRE PROTECTION DISTRICT; THE WATER WORKS, SEWER AND GAS BOARD OF THE CITY OF SCOTTSBORO; UTILITIES BOARD OF THE TOWN OF CITRONELLE d/b/a SOUTH ALABAMA UTILITIES; THE WATER AND SEWER BOARD OF THE CITY OF TALLADEGA; TRI-COMMUNITY WATER SYSTEM; THE WATERWORKS AND SEWER BOARD OF THE CITY OF PRITCHARD; AND THE WATERWORKS AND SEWER BOARD OF THE TOWN OF WESTOVER,

Plaintiffs,

AUBURN WATER WORKS BOARD; JASPER WATER WORKS AND SEWER BOARD, INC.; OPELIKA WATER WORKS BOARD; THE WATER WORKS AND SANITARY SEWER BOARD FOR THE CITY OF MONTGOMERY; and THE WATER WORKS AND SEWER BOARD OF THE CITY OF SELMA,

Plaintiff Intervenors,

v.

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HARCROS CHEMICALS, INC.; JONES CHEMICALS, INC.; VAN WATERS & ROGERS, INC.; PB&S CHEMICAL CO., INC.; and INDUSTRIAL CHEMICALS, INC.,

Defendants.

FINAL ORDER GRANTING SUMMARY JUDGMENT

This cause comes before the court on the following motions:

1. The August 22, 1994, motion by defendant Industrial Chemicals, Inc. for summary judgment;

2. The August 24, 1994, motion by Jones Chemicals, Inc. for summary judgment;

3. The August 25, 1994, motion by defendant PB&S Chemical Co. for summary judgment;

4. The August 26, 1994, motion by defendant Harcros Chemicals, Inc. for summary judgment;

5. The August 25, 1994, motion by defendant Van Waters & Rogers, Inc. for summary judgment;

6. The August 26, 1994, motion by Industrial Chemical to exclude proffered testimony of plaintiffs' experts; and

7. The October 27, 1994, motion of defendant Jones Chemical Company to strike the declaration of Barbara Krysti.

Having considered the motions, the pleadings, the submissions of counsel, and the applicable law, the court is of the opinion that judgment is due all defendants as a matter of law, there being no genuine issue of material fact, and there being no just reason for delay in entering a final judgment. Accordingly, in conformity with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the August 22, 1994, motion by defendant Industrial Chemicals, Inc. for summary judgment be and it hereby is GRANTED. It is

FURTHER ORDERED, ADJUDGED and DECREED that the August 24, 1994, motion by Jones Chemicals, Inc. for summary judgment be and it hereby is GRANTED. It is

FURTHER ORDERED, ADJUDGED and DECREED that the August 25, 1994, motion by defendant PB&S Chemical Co. for summary judgment be and it hereby is GRANTED. It is

FURTHER ORDERED, ADJUDGED and DECREED that the August 26, 1994, motion by defendant Harcros Chemicals, Inc. for summary judgment be and it hereby is GRANTED. It is

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FURTHER ORDERED, ADJUDGED and DECREED that the August 25, 1994, motion by defendant Van Waters & Rogers, Inc. for summary judgment be and it hereby is GRANTED. It is

FURTHER ORDERED that the October 27, 1994, motion of defendant Jones Chemical Company to strike the declaration of Barbara Krysti be and it hereby is GRANTED, said testimony being inadmissible hearsay. It is

FURTHER ORDERED that the testimony of Dr. James T. McClave be and it hereby is STRICKEN. It is

FURTHER ORDERED that the testimony of Perry Garner be and it hereby is STRICKEN. It is

FURTHER ORDERED that the testimony of Loraine and Peter Casassa be and it hereby is STRICKEN. It is

FURTHER ORDERED that the affidavit of Woody Caine be and it hereby is STRICKEN. It is

FURTHER ORDERED that the margin notation about Woody Caine be and it hereby is STRICKEN. It is

FURTHER ORDERED that the affidavit of Barbara Krysti be and it hereby is STRICKEN. It is

FURTHER ORDERED that all remaining outstanding motions be and they hereby are DECLARED MOOT by the entry of this order. It is

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FURTHER ORDERED, ADJUDGED and DECREED that FINAL JUDGMENT be and it hereby is ENTERED in favor of the defendants, and the plaintiffs shall have and recover nothing of the defendants in this action.

DONE and ORDERED this 22nd day of February 1995.

s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 9, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-6234

CITY OF TUSCALOOSA; MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, et al.,

Plaintiff-Appellants,

AUBURN WATER WORKS BOARD; JASPER WATER WORKS AND SEWER BOARD, INC., et al.,

Plaintiffs-Intervenors-Appellants,

versus

HARCROS CHEMICALS, INC.; JONES CHEMICALS, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

BEFORE: TJOFLAT and COX, Circuit Judges, and WELLFORD*, Senior Circuit Judge.

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* Honorable Harry W. Wellford, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

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PER CURIAM:

The petition(s) for rehearing filed by Appellee, Industrial Chemicals is DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE